

**DEVELOPMENT OF A SELF ENFORCEABLE
ONLINE ARBITRATION SYSTEM**

IS THE KEY

**TO EFFECTIVE ONLINE DISPUTE
RESOLUTION (ODR)**

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I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those rules.

JAYNEFRANCES W. NABAWANUKA

DEDICATION

To Edward who inspired me to come to UCT.

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To God be the Glory for great things He has done for me.

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CHAPTER ONE

1.0 INTRODUCTION

Disputes are an inevitable part of society. With the evolution of the Internet, there also evolved disputes related to its use. Like one writer put it: "...disputes are inevitable in human endeavours. It would be a bland and boring world if there were no differences, no conflict and no disputes – if everyone agreed on everything."¹ Disputes as an integral part of society have the potential of destroying or strengthening relationships. Disputes therefore, need to be resolved early, constructively and cost effectively.² Dispute resolution covers the skills, knowledge, processes, philosophy and approach needed to achieve this.³

1.1 ADR IN GENERAL

Alternative Dispute Resolution is the settlement of disputes in other ways other than going to court. In other words it is the alternative to court proceedings. Over the years ADR has gained popularity, especially in international contracts. Parties to international contracts often include a dispute settlement clause providing for ADR in their contracts.

In a broad sense ADR is comprised of negotiation, mediation and arbitration. The different sub-components within the three categories above will not be specifically looked into. Negotiation, mediation and arbitration are defined below.

1.1.1 Negotiation

Negotiation is essentially a process whereby parties involved in a conflict, or facing a common problem, seek a mutually acceptable settlement or method of resolving their

¹ Jennifer David in a paper entitled *Designing Dispute Resolution Systems* presented at the 2nd International conference on Mediation held 18th-20th January 1996 Australia

² *ibid.*

³ *ibid.*

differences.⁴ It lays emphasis on verbal exchange but may be accompanied by the use of other more coercive tactics.⁵

The process is voluntary. Under this process the parties may engage the services of a negotiator to foster their dialogue. It is said that under this category, the party with more power⁶ will carry the day.⁷

1.1.2 Mediation

Mediation is not easy to define.⁸ According to Folberg and Taylor mediation is the process by which the participants together with the assistance of a neutral person or persons, systematically isolate disputed issues in order to develop options, consider alternatives, and reach a consensual settlement that will accommodate their needs.⁹ There are however, instances when mediation does not do this but merely involve incremental bargaining towards a compromise solution.¹⁰ Meanwhile Boulle and Rycroft after noting that mediation does not provide a single analytical model which can be neatly described and distinguished from other decision-making processes define mediation as:

“... a decision-making process in which the parties are assisted by a third party, the mediator, the mediator attempts to improve the process of decision-making and assist the parties reach an outcome which each of them can assent.”

⁴ Mark Anstey, *The negotiation process: techniques of negotiation and dispute resolution*, (Ed. Paul Pretevis) 1993 Page 17

⁵ *ibid.*

⁶ Normally we consider someone as being powerful when that person has a lot of power to exercise. According to Michel Foucault *The History of Sexuality* Volume 1 (1981) at pg 93-97, power is not a possession, but more of a relation in nature: power is not owned, but exercised only. Power does not belong to a person or an institution, but exists only in being exercised by a person or an institution.

⁷ Because a person has so much power at their disposal their opponent will be compelled in settlement for fear of the power being exercised.

⁸ Laurence Boulle and Alan Rycroft, *Mediation; Principles, Process and Practice* Butterworths 1997, Chapter 1 Page 3

⁹ J Folber and A Tsylor, *Mediation; A Comprehensive Guide to Resolving Conflict Without Litigating*, 1984, Page 7

¹⁰ Laurence Boulle and Rycroft, Page 4

The mediator is a third party to the dispute who is required to be impartial. Mediation is heavily dependant on the good will and willingness of the parties to resolve the dispute. As a process it is highly informal giving the disputants the ease and comfort that is required for them to reach an amicable settlement. The mediator cannot force a settlement on the parties. The parties therefore voluntarily enter the process and if there is agreement the mediator may help them draft a settlement agreement which when entered is a binding contract. The mediation settlement agreement does not have the force of a court judgment or an arbitral award; it can therefore not be executed as such. In spite of all that, mediated settlements have a very high success rate.¹¹

1.1.3 Arbitration

Arbitration may be imposed by statute or may be chosen by the parties to a dispute before (*Ex ante*) the occurrence of the dispute or after (*Ex post*) the dispute has arisen. Consensual arbitration, arbitration that is chosen by the parties whether prior or after the dispute arises and not super-imposed by statute, is statutorily regulated the world over. In South Africa, it is regulated under the Arbitration Act No.42 of 1965.¹²

The South African arbitration legislation does not define arbitration but it is generally agreed that arbitration has five essential characteristics:¹³

- It is a procedure for resolving civil disputes;
- It is based on a consensus derived from an enforceable agreement;
- The arbitrator is appointed by, or on behalf of, the parties;
- The arbitration agreement must contemplate that the arbitrator will be impartial and make a decision (award) after receiving and considering evidence that the parties make;

¹¹ Randall Ralph Titus, *Taming the Wild Web-Online Dispute Resolution*, Masters Dissertation, Laurence Boule and Rycroft, *Mediation; Principles, Process and Practice*, Butterworths 1997, Chapter 1 Page 3 UCT 2003 unpublished. According to him the success rate ranges from 80 to 85 per cent

¹² The Act commenced on 14 April 1965 and has been amended twice, by the Justice Laws Rationalisation Act No.18 of 1996 and the General Law Amendment Act, No.49 of 1996

- The arbitrator's award is final subject usually only to limited review by the courts

Arbitration may therefore be defined as a procedure in which a dispute is submitted, by agreement of the parties, to one or more arbitrators who make a binding decision on the dispute.¹⁴ Arbitration essentially resembles litigation in that a tribunal or an arbitrator will receive evidence (of one sort or another), hear arguments and make a binding decision.¹⁵

For an arbitration to take place there must be a dispute. Unlike in the court system where the parties do not agree on a court of competent jurisdiction, an arbitrator's jurisdiction is drawn from the autonomy of individuals to agree how their existing or future disputes are to be resolved. Arbitration is therefore essentially dependant on the parties' agreement to arbitrate their disputes. In arbitration parties not only choose the forum for resolving their dispute but also agree to the rules of procedure and the law applicable to their dispute.¹⁶ The parties' choice of law applicable to their contract must however, be *bona fide*, legal and its enforcement must not be contrary to public policy.¹⁷

The arbitral award is enforceable in courts of law. This distinguishes arbitration from other forms of ADR.

1.2 ADVANTAGES OF ADR

This section will concentrate on two forms of ADR i.e. mediation and arbitration thus only the advantages and disadvantages of mediation and arbitration are explored. Even

¹³ Butler and Finsen, *Arbitration in South Africa: Law and Practice* (Juta 1993) 1-3.

¹⁴ <http://www.unc.edu/courses/2004spring/law/357c/001/projects/bandit/odr/index.htm> accessed on 18th July 2005

¹⁵ *ibid.*

¹⁶ It is trite law that contracts are governed by the law chosen by the parties: art.3.1 of European Council Convention on the law applicable to Contractual Obligations (Rome 1980); the common law produces the same effect as article 3.1

¹⁷ The decision in the South African case of *Vita Food Products Inc v Unus Shipping Co Ltd* [1939] AC 227 (27) was to this effect, in this case it was held that: provided the intention expressed is *bona fide* and

these are looked at briefly because the major focus of the work is online arbitration that is covered subsequently.

There is no doubt that ADR has many advantages over settlement of disputes through the traditional court system. Its various advantages have made ADR very popular and transformed it in many instances into the preferred means of settling disputes. This is especially so in cross-boarder transactions. Besides easing the caseloads on the courts, ADR increases compliance due its voluntary nature that makes the resolutions voluntary. Moreover, courts and legislation increasingly encourage ADR; in various areas of dispute, parties are required to use ADR before they are given recourse to trial.¹⁸ Some of the advantages of the ADR system are enumerated below:

1.2.1 Parties' choice of arbitrator or arbitral tribunal

Perhaps the most significant advantage of ADR is the parties' autonomy to select their own arbitrator or arbitral tribunal or to have one selected on their behalf. This enables the parties to pick on an arbitrator with the necessary qualifications, expertise and experience to hear and determine their unique dispute. The major advantage of having an expert in a particular field arbitrating a matter is that decisions are made with the full understanding of the operations and customs of that field making the awards more realistic. This may not necessarily be the case in a court trial where the judge may not have had any prior knowledge of the operations of the sector and may fail to acquire enough knowledge in the course of the trial to enable the reaching of a meaningful decision. In addition to the foregoing the parties' hand in the choice of arbitrator makes the award more acceptable to the disputants.

legal, and provided there is no reason for avoiding the choice on the ground of public policy the parties choice would be effectuated.

¹⁸ Steven Shavell, *Alternative Dispute Resolution: An Economic Analysis*, Journal of Legal Studies (24 JLEGST 1) accessed at <http://international.westlaw.com/search/default> viewed on 18th July 2005.

1.2.2 Private and confidential

Whereas in litigation the case and all the proceedings are a public affair in ADR this unwelcome publicity is contained. ADR is private in nature therefore the parties' private affairs are not put to public ridicule. Disputants employing ADR methods are able to divulge confidential information more easily because they are assured that the information would be received confidentially and not be released to the public. This is especially important for businesses that need to keep trade secrets and in family disputes where the issues are sensitive and as such privacy is ultimate. As a result of this decisions are usually made with a wider knowledge of the facts than would be the case in a court trial where the parties would be reluctant to expose certain information that they do not wish to get public making the decisions more realistic and acceptable to the parties thus easier to implement.

1.2.3 Expeditionousness

Settlement of disputes through ADR methods may in most cases be quicker than the ordinary court system. The parties may choose on shorter time periods for performing certain procedures like giving notice to arbitrate, entering appearance and filing defences. For example a defendant in a simple arbitration matter may be given just a few hours or days within which to enter appearance and communicate their defence unlike the case with court trials where the time periods are longer and standard and may not be called for in simple cases.¹⁹ In a court trial, the parties would have to wait for the court to set a hearing date at its convenience. Not forgetting that this time may not be convenient to either or all the parties. Setting down a case for hearing takes a very long time mainly due to the caseloads. With ADR systems the parties have control of their case. After selecting the arbitrator, the parties can easily set a hearing date convenient to them and their arbitrator(s) making the process quick. This may not always be the case.

¹⁹ In Uganda a party who wishes to file a civil suit against a non governmental entity is according to Civil Procedure Rules required to give notice to the intended defendant of at least 21 days (the period is 45days for governmental entities), on filing the suit the defendant is then accorded another 15days within which to enter appearance and file a defence, which period can be extended for good cause.

1.2.4 Flexible

ADR systems are very flexible. For instance, under mediation the parties have total control of their case, with the mediator just facilitating their reaching an agreement. The mediation decision is therefore by the parties. This makes it easier to accept and implement.

Arbitrations too are flexible. The parties determine the "rules of the game," either by designing the process themselves or by choosing the seat of arbitration.²⁰ When designing the process the parties enjoy flexibility on matters of time and procedure. The parties have the right to choose the procedural rules to apply to their dispute. For example the parties may choose the International Chamber of Commerce (ICC)²¹ Arbitration rules to apply to their dispute and even when they choose these to apply; they may vary the rules to suit them.

In some instances some procedures of the trial for example examination and cross-examination of witnesses may be done away with and instead an agreed statement of facts presented by the disputants. This would make the process even faster. The fact that arbitration allows parties to determine the rules of procedure is particularly advantageous in cases where parties involved in disputes are governed by different legal systems.²²

Unlike judges precedents do not strictly bind arbitrators. Though under obligation to make decisions in accordance with the law the fact that precedents do not bind them strictly enables the arbitrators to make their decisions unique to the circumstances of the different cases. As is discussed below this could also be a disadvantage.

²⁰ Christina Leb, *Arbitration as a Solution for Protracted and Intractable Conflicts*, viewed at <http://www.beyondintractability.org/m/arbitration.jsp?nid=2447> accessed on 10th August 2005

²¹ International Chamber of Commerce (ICC) Arbitration Rules (came into effect on 1st January 1998) may be accessed at <http://www.iccwbo.org/court/english/arbitration/rules.asp>

1.2.5 Less expensive

ADR methods generally reduce the cost for parties to find a resolution to their dispute. The processes in ADR methods are not complicated making it easier for parties to conduct their own cases without the necessity of retaining lawyers unlike court processes that are so complicated and may not be easily understood by a lay person. A party who wishes to save on legal fees may conduct their case via ADR methods with less fear of jeopardizing the case than in court litigation.

In addition to this, the quickness of ADR methods translates into reduced costs. For example personnel spend less time on handling disputes this results in the time saved being applied gainfully elsewhere. This is especially the case in employment matters where personnel are often called upon to give evidence in protracted court proceedings leaving their duty stations. The personnel in issue would receive a wage for the time spent in court yet no actual services would be delivered. Often times extra help has to be hired to cover up for the personnel who is otherwise engaged in court, making a double expenditure for the company. The expenditure would not be the same when ADR methods are employed to resolve disputes because the time spent on the case is in most of the cases shorter than the time spent on court proceedings.

1.2.6 Binding/finality

When parties choose mediation or arbitration as the process to resolve their dispute they contractually bind themselves to accept the outcome. At the end of a successful mediation the parties enter a binding settlement which the mediator may help the parties draft. The parties are meant to implement their settlement willingly, which is not always be the case. Nevertheless the settlement is a binding contract that can be enforced by recourse to courts of law in an action for specific performance or damages. In such an action the court will in most instances be looking at the enforcement of the settlement contract and not the underlying contract.

²² Christina Leb, n.20, slightly modified

Meanwhile an arbitration award is final and binding on the parties.²³ Theoretically, the submission of the parties to arbitration implies that the parties will agree to carry out the award without delay.²⁴ However in adversarial dispute resolution procedures such as arbitration, parties are hoping to see their interests served.²⁵ If defeated, they are likely to consider options that promise more favourable outcomes, by challenging an obtained award or by trying to evade implementation of the decision.²⁶

There is in general, no right of appeal in arbitration however, the courts have limited powers to set aside or review an award. Article 34 of the UNCITRAL Model Law provides that: an arbitration award can be reviewed on six grounds namely:²⁷

1. Lack of capacity of the parties; or the arbitration agreement is not valid under the law to which the parties have subjected it.
2. The absence of proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present his case.
3. The award deals with a dispute not falling within the terms of the submission to arbitration, or contains decisions on matters beyond the scope of the submission to arbitration.
4. The composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, unless such agreement was in conflict with a provision of this Law from which the parties cannot derogate, or, failing such agreement, was not in accordance with the Model Law.

²³ This is not the case for all arbitration cases, parties may opt for non-binding arbitration or unilaterally binding arbitration.

²⁴ Christina Leb, *supra*

²⁵ Christina Leb, *supra*

²⁶ Christina Leb, *supra*

²⁷ Article 34 of the United Nations Commission on International Trade Law(UNCITRAL) Model Law on International Commercial Arbitration(1985) accessed at <http://www.uncitral.org/english/arbitration/ml-arb.htm>

5. The subject-matter of the dispute is not capable of settlement by arbitration.
6. The award is in conflict with the public policy.

The fact that an arbitral award is final and binding and may only be challenged under very limited circumstances makes the process even faster in realising remedies for the disputants.

1.2.7 Less adversarial, confrontational, intimidating

ADR methods create an atmosphere that is less confrontational and less adversarial. They are more cooperative and less competitive than adversarial court-based methods like litigation.²⁸ Parties seek to solve the dispute and not necessarily to win. In many ADR cases there is a win-win situation which is rarely the case in court trials where ‘the winner takes all’ is the norm. It is said that participating in an ADR process will often ultimately improve, rather than worsen, the relationship between the disputing parties.²⁹ This is a key advantage in situations where the parties must continue to interact after settlement is reached, such as in child custody or labour management cases.³⁰

Under ADR both parties have a say in the seat of their resolution proceedings. This is not the case in court trials where the seat is predetermined by the legal systems in place. The fact that the parties may choose to hold their proceedings anywhere they please makes it possible to have the proceedings in a convenient, conducive and relaxed environment. The process is taken away from the intimidating atmosphere of the court room in which many a people including lawyers themselves are never comfortable. The absence of intimidation enriches the process thus giving more meaningful easier to accept and implement decisions.

²⁸ Alternative Dispute Resolution(ADR) viewed at <http://www.beyondintractability.org> accessed on 3rd August 2005

²⁹ *ibid.*

³⁰ *ibid.*

1.2.8 Convenience

ADR methods are much more convenient compared to court trials. The parties choose when and where to have their dispute resolved. Not only do they choose where and when but also how and by whom. All this is done at their convenience. They may choose to settle their problems in the comfort of their offices, over the weekend, after hours, all this is at their discretion. Of course this sort of leeway comes with the disadvantage that finding a convenient time for all the parties involved may get difficult and as a result the process may be prolonged as is the case with litigation.

1.2.9 Reduction of case loads

Employment of ADR methods to resolve disputes reduces caseloads on the courts. Enormous case loads are the major reason for the court system being slow. In reducing caseloads, ADR enables the courts to operate better.

1.2.10 Avoidance of jurisdictional problems

In the litigious world, when a dispute arises and the parties want to seek redress from the courts of law, it is necessary for the party initiating the cause to file the cause in the right forum. Failure to file the cause in the right forum will mean that the cause will be dismissed for lack of jurisdiction. This would necessitate refiling the cause before the right forum, imagine the time waste and the costs involved in the false start. With ADR methods the parties agree on the forum for resolving their dispute prior to the dispute or after the occurrence of the dispute thus creating certainty.

In international transactions jurisdictional problems are immense. Different countries have different systems of law and accord their citizens differing rights and responsibilities. The parties, however, are free to agree on the law applicable to their contracts³¹ and to the forum to resolve their disputes. When the parties to an

³¹ The parties' choice can only be questioned if it is not *bona-fide*, legal or is against public policy.

international transaction opt for ADR methods to resolve their disputes, they remove the uncertainties and inconveniences of the different court systems.

1.3 DISADVANTAGES OF ADR

1.3.1 Delaying tactics

The smooth operation of ADR is dependant on the good will and good faith of its users. Some parties use ADR methods like mediation as a means of stalling court proceedings with no intention of entering a settlement or executing one if entered. Employing ADR in this way makes the process of realising a remedy slower than direct resort to court proceedings.

1.3.2 Could be more expensive and less efficient

ADR methods derive their advantage of relatively lower cost compared to court trials mainly from their capacity to be expeditious. If the ADR process is not run expeditiously and effectively it may end up being even more expensive than an ordinary court trial.

In addition to the foregoing, the parties in an ADR process are responsible for paying for the facilitator's services, while the court system provides an adjudicator who does not charge a fee.³² The fees for an arbitrator can be hefty.³³ To give an example, for an amount of claims up to USD\$100,000, the minimum fee for a single arbitrator is USD\$2,000.³⁴ The maximum fee can reach ten percent of the claim.³⁵ However, supporters of arbitration argue that this should be more than compensated for by the potential for the increase in the efficiency of arbitration to reduce the other costs involved.³⁶

³² Leslie Grant, *What is Arbitration*, <http://www.mediate.com/articles/grant.cfm> accessed on 10th August 2005

³³ *ibid.*

³⁴ *ibid.*

³⁵ *ibid.*

³⁶ *ibid.*

1.3.3 Lack of judicial precedent

Unlike the matters that are heard in the traditional court system; decisions reached in the ADR system do not form binding precedent and therefore do not affect general legal practice.³⁷

1.3.4 Inappropriate for some cases

Employment of ADR methods to settle disputes may not be appropriate in cases where there is need for public vindication or where civil or constitutional rights are at stake.³⁸

As has already been discussed above, ADR encourages compromise. Compromise may be a good way of settling some disputes but may be completely inappropriate for other categories of cases. For example in cases of personal or individual rights compromise may not be the best option because the issues are too important to the disputants to be compromised on. In such cases the best means of settlement of disputes would be resort to court.

The private nature of ADR decisions may be a disadvantage in some cases that call for public scrutiny of issues. For example, using ADR to settle matters out of court could allow a company to resolve many instances of a defective product harming consumers, without the issue getting any public exposure.³⁹ On the other hand, a court ruling could force the company to fix all problems associated with the bad product or even to remove it from the market.

³⁷ Randall Ralph Titus, University of Cape Town Masters Course '*Taming the Wild Web-On-line Dispute Resolution*' unpublished

³⁸ *ibid.* p.18

1.3.5 Lack of appeal

Much as finality may be an advantage, it may on the other hand turn out to be a great disadvantage. Unless there is evidence of outright corruption or fraud, the award is binding and usually not appealable.⁴⁰ Thus if the arbitrator makes a mistake, or is simply an idiot, the losing party usually has no remedy.⁴¹

1.3.6 Splitting the baby/compromised decision

ADR methods promote a win-win settlement. Arbitrators for instance have the power to make decisions based on fairness, a power that is further enhanced by relaxed rules of evidence in arbitration as a result of this the arbitrator may render an award that, rather than granting complete relief to one side, splits the baby by giving each side part of what they requested.⁴² What is fair is not always the just decision.

1.4 ONLINE DISPUTE RESOLUTION (ODR)

1.4.0 INTRODUCTION

The number of transactions over the Internet is continuously rapidly expanding.⁴³ The Internet has made it possible for businesses and consumers to engage in transactions around the globe without regard to geographic limitations.⁴⁴ It should be noted at this point that the internet is largely responsible for the creation of the sector of international B2C transactions. Before the Internet, B2C commerce between parties from different

³⁹ Alternative Dispute Resolution(ADR) viewed at <http://www.beyondintractability.org> accessed on 3rd August 2005

⁴⁰ Leslie Grant, *supra*.

⁴¹ *ibid*.

⁴² *ibid*.

⁴³ According to Global Reach, approximately 801.4 million people could access the Internet by September 2004 see <http://www.glreach.com/globstats> last updated on 30th September 2004 accessed on 30th June 2005

⁴⁴ Leslie Grant

nations was extremely limited.⁴⁵ The Internet presents a twenty four hours, 365 days market place.

Thanks to the Internet consumers have a variety of goods and services to choose from and are able to shop in the comfort of their homes and offices, just at the click of a button. However, each transaction made over the Internet has potential of transforming into dispute.

The uncertainty of the means of settling disputes resulting out of transactions online may keep many potential consumers away. Consumers are hesitant to purchase expensive items online because they are uncertain of the successful performance of the contracts. How should the disputes generated online be resolved in order to keep all the parties involved happy and have confidence in dealing online is the million dollar question. Not until this question is answered satisfactorily will the Internet be able to reach its unimaginable potential for ecommerce.

The nature of the Internet is such that it transverses geographical borders and is as a result not the object of one sovereign state of the parties involved in transactions. With no uniform laws or court systems in cyberspace, disappointed consumers are groping for ways to resolve online consumer disputes that reflect the speed, efficiency, and convenience of online technologies.⁴⁶ In this fast-paced environment, government agencies, e-businesses, and consumer groups are scrambling to find answers that will bolster consumer confidence in this burgeoning online marketplace.⁴⁷

⁴⁵ Karen Stewart and Joseph Matthews, *supra*, para.1113

⁴⁶ Lucille M. Ponte, *Throwing Bad Money after Bad: Can Online Dispute Resolution (ODR) really deliver the goods for the unhappy Internet shopper?* Vol.3 Tulane Journal of Technology and Intellectual Property (Tul. J. Tech. & Intell. Prop.) P55 at page 57. He went on to state that the issues of choice of law, enforceability, and sovereignty found in offline dispute resolution are magnified by the cross-border nature of the Internet. The article was accessed at West Law <http://international.westlaw.com/search/default> on 24th June 2005.

⁴⁷ *ibid.* p. 57

Traditional dispute resolution systems are most often ill equipped to provide effective redress.⁴⁸ The competent court may be located far away, or be too expensive for small disputes, or be too slow for business needs.⁴⁹ Traditional arbitration and other forms of ADR are also often incapable of meeting the expectations of users for similar reasons.⁵⁰ All these deficiencies resulted in a vacuum.⁵¹ A vacuum that only dispute resolution methods modelled on the very activities that gave rise to the disputes could fill. As a result of the multitude of disputes arising out of online transactions, ODR has emerged as an attempt at resolving these disputes. How then should ODR be effectively applied to win the confidence of consumers in the Internet? Before answering this question we need to first define ODR.

1.4.1 WHAT IS ODR?

ODR has its origins in different fields, and defining it as a *sui generis* method of dispute resolution would ignore these origins.⁵² Meanwhile defining ODR as online ADR⁵³ would be incomprehensive leaving out dispute resolution methods like cybercourts that are unique to ODR. Consequently, presenting ODR as a mere extension of ADR would not reflect all of its possible applications and goals.⁵⁴

Whereas ADR emerged as a result to court deficiencies, ODR was born to address not only these deficiencies but all of offline resolution methods. ODR's all encompassing

⁴⁸ G. Kaufmann-Kohler and T. Schultz, *Online Dispute Resolution-Challenges for Contemporary Justice*, (Kluwer Law International, 2004),p.1

⁴⁹ *ibid.*

⁵⁰ *ibid.*

⁵¹ *ibid.*

⁵² G. Kaufmann-Kohler and T. Schultz, p.6

⁵³ In an interview of Gregory Hunt, Manager of Dispute Resolution Services of the Chartered Institute of Arbitrators, reproduced in G. Kaufmann-Kohler and T. Schultz,n.46 p.295, he stated that "ODR is, I believe, simply a new tool for ADR; the term 'ODR' relating to the use of technology and the Internet-related communications in dispute resolution. The idea is that ODR should be seen as a tool that assists parties and the neutrals in resolving disputes using the Internet and related technologies, but it does not limit the parties to communicate online"

⁵⁴ *ibid.*

features are that it can take place either entirely or partly online and concerns two types of disputes:⁵⁵ those that arise in cyberspace and those that arise offline.⁵⁶

This work adapts the definition used by Kaufmann-Kohler and Thomas Schultz in, *Online Dispute Resolution-Challenges for Contemporary Justice*⁵⁷ where they followed the definition by the American Bar Association Task Force on ecommerce and ADR⁵⁸ and extended it to include cybercourts which is:

“ODR is a broad term that encompasses many forms of ADR and court proceedings and that incorporates the use of the Internet, websites, email communications, streaming media and other information technology as part of the dispute resolution process. Parties may never be face to face when participating in ODR. Rather, they might communicate solely online.”

The following section is going to look at the development of ODR with major emphasis on online arbitration and then review the types of ODR stating their advantages and disadvantages.

1.4.2 THE DEVELOPMENT OF ODR

While the sceptics doubt that the new medium will be able to replicate existing techniques; the enthusiasts see ODR as an opportunity to develop new resources to manage human conflict.⁵⁹ Some writers believe that ODR is not a passing trend, or some legal or business fad⁶⁰, or a new tool of dispute resolution but a movement similar to the ADR movement of the seventies.⁶¹

⁵⁵ The Pros and Cons of Online Dispute Resolution: An assessment of cyber-mediation websites accessed at <http://www.law.duke.edu/journals/dltr/articles/2003dltr004.html> viewed on 20th June 2005

⁵⁶ *ibid.*

⁵⁷ G. Kaufmann-Kohler and T. Schultz, *supra*, p.7

⁵⁸ American Bar Association Task Force on ecommerce and ADR, Addressing Dispute in Electronic commerce. Final Report and Recommendations

⁵⁹ Melissa Conley Tyler and Di Bretherton, ‘*Online Alternative Dispute Resolution*’, Vindobona Journal of International Commercial Law and Arbitration 2003, 7VJ 199,p.200,accessed at <http://international.westlaw.com/search/default> viewed on 20th June 2005

⁶⁰ John Helie, ‘Borderless ODR’ viewed at <http://www.heliigroup.com> accesses on the 24th Jun 2005. John Helie is the founder of Mediate.com

⁶¹ G. Kaufmann-Kohler and T. Schultz, *supra*, p.67

The development of ODR is a reaction to changes in society to wit: continued developments in technology and the development of globalisation and weakening of national borders. ODR allows the technological capabilities of the Internet to be directed at the challenge of responding to disputes.⁶² The online environment is a fast environment that called for the development of a system of dispute resolution that is comparable in speed to the medium in which the dispute arose.

The driving forces behind the growth of ODR have been: the need and right to access justice, difficulties in using traditional courts and traditional ADR, the need to build confidence in ecommerce and the potential of the online medium to provide more effective ADR techniques for both online and offline disputes.⁶³ The enforcement of rights in situations of small and long distances undisputedly requires adequate dispute resolution mechanisms, better adapted than the traditional systems.⁶⁴ The need for adequate dispute resolution processes is particularly felt for the consumer, as opposed to the business, because of the risk caused by prior performance through advance payments, which is the dominant practice in distance contracts.⁶⁵

ODR has now gone through three broad stages of development.⁶⁶ The first one was the 'hobbyist' phase where individual enthusiasts started work on ODR often without formal backing.⁶⁷ The second was the 'experimental' phase where foundations and international bodies funded academics and non-profit organisations to run pilot programs.⁶⁸ This is the phase under which the Virtual Magistrate (VMAG) was developed. The next development was the 'entrepreneurial' phase where a number of for-profit organisations launched private ODR sites.⁶⁹ It is said that ODR is now

⁶² *ibid.* p.xv

⁶³ Melissa Conley Tyler and Di Bretherton, n.56, p.201

⁶⁴ G. Kaufmann-Kohler and T. Schultz, *supra*, p.70

⁶⁵ *ibid.* p.70 quoting A.M Froomkin, 'The essential Role of Trusted Third Parties in Electronic Commerce' [1996] Or L Rev 49, p.68

⁶⁶ Melissa Conley Tyler and Di Bretherton, n.56, p.201

⁶⁷ *ibid.*

⁶⁸ *ibid.*

⁶⁹ *ibid.*

entering a fourth 'institutional' phase where it is piloted and adopted by a range of official bodies.⁷⁰ An example of this is Singapore's e@adr.

1.4.2.1 The Virtual Magistrate

The Virtual Magistrate was the first ever experience of a formal online dispute resolution.⁷¹ The main aim of this project was to demonstrate that online technology could be used to resolve online disputes in a quick, cost-effective, and accessible means using arbitration.⁷² The VMAG project was a joint academic exercise between the Cyberspace Law Institute and the American Arbitration Association funded by the National Centre for Automated Information Research and hosted by the Villanova Centre for Information Law and Policy.⁷³

The goal of its developers was to provide a forum in which system operators could resolve disputes when third parties brought to their attention allegations of tortuous communications appearing on their systems.⁷⁴ The VMAG attempted to accomplish this goal by 'providing informed and neutral judgments on appropriate responses to complaints concerning allegedly wrongful postings'.⁷⁵

Under the project a person with a dispute related to online activity would contact the project managers via e-mail with a complaint describing the problem. The defendant would then be contacted by the VMAG via e-mail and asked to participate in the proceedings.⁷⁶ The project would then select an arbitrator to preside. The entire proceedings would occur online, with all documents and questions to the parties being

⁷⁰ *ibid.*

⁷¹ G. Kaufmann-Kohler and T. Schultz, *supra*, p.27

⁷² Aashit Shah, 'Using ADR to resolve Online Disputes.' Richmond Journal of Law and Technology (10 Rich. J. L. & Tech.25), Spring, 2004 accessed on <http://international.westlaw.com/search/default> viewed on 20th June 2005

⁷³ Karen Stewart and Joseph Matthews, 'Online Arbitration of Cross-Border, Business to Consumer Disputes', 2002 University of Miami Law Review, para.1124 viewed at <http://international.westlaw.com/search/default> on 20th June 2005

⁷⁴ *ibid.*

⁷⁵ R. Gellman, A brief History of the Virtual Magistrate Project: The early months', NCAIR Dispute Resolution Conference viewed at <http://www.mantle.sbs.umass.edu/vmag/gellman> accessed on 20th June 2005

⁷⁶ Karen Stewart and Joseph Matthews, para.1124, quoting R. Gellman(n.74) n.199

submitted by e-mail. The arbitrator would within three business days render a decision to the parties via e-mail.⁷⁷

The VMAG jurisdiction was limited to disputes between users of online systems, system operators, and those who claimed to be harmed by wrongful messages, postings, or files and in its lifespan reached only one decision. This was not the kind of success that had been targeted by the developers. The main reason may be that the process was voluntary and the project managers had no coercive means of enforcing decisions.⁷⁸ They had to rely on the parties to abide by the decision of the arbitrators. The VMAG, though not very successful had proved a point that disputes could be arbitrated online and served as a lesson to other providers.

1.4.2.2 The BBBOnline Project

Another early entrant was the BBBOnline launched in 1997; the BBBOnline project was established by the Better Business Bureau (BBB) to deal with disputes arising out of the purchase of goods and services via the web and various online services. Under the service in exchange for the right to post the BBB Online symbol on its web page, an online merchant makes several promises concerning its behaviour including arbitration. The BBBOnline is still operational to date as a complaint handling service.

1.4.2.3 The Online Ombuds Office University of Massachusetts

This was a project by the University of Massachusetts. The project was established in 1996 and operated similarly to a traditional ombudsperson, with the exception that the "Ombuds office" operated online. The service offered ombuds services for a wide range of online disputes. It also provided materials and case references which were hoped to promote settlement of disputes without the need for intervention by an online ombudsperson. The project's major mode of communication was by email although discussion groups and videoconferencing technology was sometimes used.

⁷⁷ *ibid.*

The ODR field has been very active over the years. Many providers have joined and many have left and yet many have spread their wings from providing only one service to providing a full range of services.

1.4.3 TYPES OF ODR

“...ODR is an exciting field because it is a field of discovery in how to apply emerging and powerful informational resources. The Internet becomes a more powerful and interesting phenomenon when the processing power of computers is added to the delivery of information. The more we are able not simply to deliver information but to deliver technological capabilities for managing the flow and evaluation of information, the more we acquire a resource that is different from simple tools like pens and flip charts that already have a role in various dispute resolution processes. As we begin to interact with machines at a distance, we will not necessarily replace arbitrators or mediators but we may displace them, in the sense that they will have an ally, something that may change their role and eventually become robust enough to be considered a ‘fourth party’...”⁷⁹

From the words of Professor Katsh quoted above it is evident that ODR is a continually developing process. It keeps developing with the emergence of new technologies. The processes of ODR today might be completely out of place tomorrow because of the always-changing capabilities of technologies. What may be perceived as a constraint today will no longer be a constraint with the development of new technologies.

Currently ODR provides a range of services including: negotiation, mediation, arbitration, modified jury trials and cybercourts. It may, however be divided in two broad categories namely; non-adjudicative and adjudicative methods.

⁷⁸ *ibid.*

⁷⁹ Professor Ethan Katsh, Professor of Legal Studies and Director, Centre for Information Technology and Dispute Resolution, University of Massachusetts, Amherst in his foreword to G. Kaufmann-Kohler and T. Schultz, *Online Dispute Resolution-Challenges for Contemporary Justice*, (Kluwer Law International, 2004),p.xv

The non adjudicative methods which are composed mainly of negotiation and mediation deal with mainly disputes that affect people's interests while the adjudicative methods, mainly arbitration, jury trials and cybercourts deal with disputes that affect people's rights.

The various forms of ODR, their advantages and disadvantages will be briefly discussed below. Because in online arbitration is seen the potential of effectively resolving online even offline disputes due to its binding nature and the court support and recognition of its awards, it is given major emphasis.

1.4.3.1 Assisted negotiation

Assisted negotiation is also called 'enhanced negotiation' or 'technologically facilitated negotiation'.⁸⁰ It is referred to as 'assisted' because the parties are facilitated by web-based programmes with built-in intelligence.

In this form of ODR there is no involvement of a human third party. The computer however plays a facilitative role. The computer offers standard solutions to the disputants. Some of the systems automatically ask the parties at regular intervals what they believe their goals and interests are. This way the programmes help the disputants realise that these goals and interests evolve thus helping them reach new constructive solutions.⁸¹

Assisted negotiation can constitute the sole and entire process of dispute resolution, or it can be part of another, larger, process.⁸² It is open to all fields and disputes except those in which the parties are not entitled to settle.⁸³

⁸⁰ O. Rabinovich-Einy, 'Going Public: Diminishing Privacy in Dispute Resolution in the Internet Age' 2002 7Va JL &Tech 4, p.29

⁸¹ G. Kaufmann-Kohler and T. Schultz, n.47 above p.14

⁸² *ibid.*, p.15

It is said that its major draw back is that because it is not face-to-face it eliminates the observation of body language and other non-verbal perceptions that play a great role in understanding the opposing party's goals and interests.

Despite of the drawbacks, assisted negotiation enjoys a high success rate.⁸⁴ There are over 15 providers of assisted negotiation. SquareTrade, which has the highest caseloads in ODR, has handled some 1 500 000 disputes from February 2000 to June 2004-its run rate as of 2004 was around 700 000 disputes a year.⁸⁵

1.4.3.2 Automated Negotiation

Automated negotiation is a form of assisted negotiation also referred to as 'blind-bidding' and sometimes as 'automated settlement systems'.⁸⁶ In this form of ODR the web-sites offer a neutral arena where the disputants define a settlement range and thereafter submit demands and offers in the form of settlement bids to a computer through a secure, password web-based communication system. Computer software automatically compares the demand and offer and e-mails the disputants to let them know whether they are within the 'defined range' of settlement or whether there was a shift towards settlement.⁸⁷

There is no human third party intervention. The computer in essence settles the case. It is referred to as 'blind' because the parties' offers are not communicated to the opposing party until they are within settlement range. Automated negotiation programmes are globally designed in this fashion not only to offer an affordable dispute resolution process, but also to provide a new instrument of communication specially designed for negotiating settlement figures-that encourages the parties to be more truthful about their bottom line.

⁸³ *ibid.*, p.16

⁸⁴ *ibid.*

⁸⁵ G. Kaufmann-Kohler and T. Schultz, *supra*, p.16 quoting Steve Abernethy, SquareTrade's CEO.

⁸⁶ J. Hornle, 'Online Dispute Resolution in Business to Consumer Ecommerce transactions' accessed at <http://www.law.duke.edu/journals/dltr/articles/2003dltr004.html> viewed on 10th August 2005

If settlement is not reached, the offers remain undisclosed.⁸⁸ Because parties do not disclose their suggested settlement amounts, they do not compromise their future bargaining positions.⁸⁹ Since there is no direct communication between the parties it gives the advantage of getting the egos and personalities out of the way of settlement.

Because the service is fully automated it is available to the parties twenty-four hours a day making it easy for parties to use it at their convenience. This is especially advantageous to parties in different geographical areas.

Most websites give the parties at least three rounds of bids⁹⁰ and in most instances require them to improve their offers or reduce their demands at least by a given percentage.⁹¹ This ensures good faith in the negotiation process.

Automated negotiation has the weakness of being inflexible and capable of handling a limited category of disputes. Automated negotiation can only handle one variable of the dispute: money.⁹²

1.4.3.3 Online Mediation

In this form of ODR a neutral human third party assists the disputants in voluntarily reaching a settlement. Online mediation as opposed to offline mediation is conducted over the Internet via electronic communication. Online mediation globally mirrors the offline world in the array of strategies, style and services that are provided, though only

⁸⁷ The Pros and Cons of Online Dispute Resolution: An assessment of cyber-mediation websites

⁸⁸ G. Kaufmann-Kohler and T. Schultz, *supra*, p.18

⁸⁹ L. M. Ponte, 'Throwing Bad Money After Bad Can Online Dispute Resolution (ODR) really deliver the goods for the unhappy Internet shopper?', n.35 above, p.68

⁹⁰ The Pros and Cons of Online Dispute Resolution: An assessment of cyber-mediation websites

⁹¹ See Lucille M. Ponte, 'Boosting Consumer Confidence in Ebusiness: Recommendations for Establishing Fair and Effective Dispute Resolution Programmes for B2C Online transactions', 12 Alb. Sci & Tech. 441-444 (2002) The article was accessed at West Law <http://international.westlaw.com/search/default> on 24th June 2005.

⁹² G. Kaufmann-Kohler and T. Schultz, *supra*, p.19

one online provider explicitly applies recognised standards drafted for offline mediation.⁹³

Online mediation is non-binding and consensual. Due to this, parties, especially defendants, are much more willing to give it a try cushioned with the fact that they have nothing to lose as they can back out of the process at any time. The mediator does not impose a settlement on the parties. The parties therefore make their own decision.

As with traditional mediation, online mediation allows the mediator to adapt the process to address the particular needs of the disputants.⁹⁴ In addition to enhancing the benefits of traditional mediation, there are advantages to resolving disputes online.⁹⁵ According to E. Casey Lide,⁹⁶ the process allows for greater flexibility, more creative solutions and quicker decisions.

Just like traditional mediation, online mediation has the benefit of lower cost compared with ordinary court litigation. Moreover the benefit of cost saving is further enhanced by the fact that the mediation is on the Internet therefore making it unnecessary for the parties to travel long distances to the venue of the mediation as is the case with traditional mediation and court litigation. Since the mediation can be carried out without the parties having to leave their offices, residences or location, it results in reduced travel expenditure. In addition to the foregoing, the parties are saved the cost of long distance telephone calls or telephone conferences. Further to this, documents are readily available and need not be transported over long distances.

⁹³ G. Kaufmann-Kohler and T. Schultz, *supra* p.22 where it is stated that Online Resolution, an ODR service provider, applies the Standards of Mediation Practice Jointly Defined by the American Bar Association(ABA), the Society of professional Dispute Resolution(SPIDR) and the American Bar Association (AAA) .The rules applied by online resolution can be accessed at their web-site which is www.onlineresolution.com/om-standards

⁹⁴ The Pros and Cons of Online Dispute Resolution: An assessment of cyber-mediation websites

⁹⁵ *ibid.*

Online mediation also has several benefits stemming from the asynchronous nature of e-mail communication.⁹⁷ Unlike face-to face mediation and traditional court litigation, under online mediation the messages are not transmitted live, but can be written and sent later.⁹⁸ Since emails and web postings may be written, posted and can be responded to at anytime online mediation is very convenient for the users.⁹⁹ There are less scheduling difficulties than in traditional mediation where sittings have to be scheduled for places and times that are convenient for all the parties concerned. In addition to this there is less idle time for the parties, for instance a mediator may caucus with one party without wasting the time of the other party who would not have to wait around as would be the case with traditional mediation.¹⁰⁰ When the Internet is utilised for caucus, the 'non-caucusing participant' does not need to wait in the waiting room or library reading Time magazine or growing resentful at being ignored.¹⁰¹

Besides saving time, asynchronous Internet communications give the parties a chance to edit and revise their communication which reduces the chances of making regrettable impulsive communications as would be the case in real time communication.

Another major advantage of online mediation is the avoidance of complex jurisdictional issues of determining which court has jurisdiction to hear the matter. This is especially a big advantage to parties in different geographical areas.

Notwithstanding the advantages discussed above, online mediation has some disadvantages when compared to traditional mediation. Electronic communication is no

⁹⁶ E. Casey Lide, 'ADR and Cyberspace: The Role of Alternative Dispute Resolution in Online Commerce, Intellectual Property and Defamation', Ohio St. J. on Disp. Resol. 193, at 208 accessed at <http://international.westlaw.com/search/default> on 10th August 2005.

⁹⁷ The Pros and Cons of Online Dispute Resolution: An assessment of cyber-mediation websites

⁹⁸ *ibid.*

⁹⁹ George H. Friedman, 'Alternative Dispute Resolution and Emerging Online Technologies: Challenges and Opportunities', 19 Hastings Comm. & Ent. L.J. 695, 712(1997)

¹⁰⁰ The Pros and Cons of Online Dispute Resolution: An assessment of cyber-mediation websites

¹⁰¹ Jim Melamed, *supra*, p. 18

substitute for the ability of face-to face conversations to foster important process values of mediation.¹⁰² The practice of mediation can never be reproduced in the online environment because ‘cyberspace’ is not a ‘mirror image’ of the physical world.¹⁰³

Online mediation can only handle a limited range of disputes. For instance, automated mediation can only handle disputes that involve money. Mediation generally is not appropriate for cases involving civil or constitutional rights or where there is need for public vindication.¹⁰⁴

According to Joel Eisen, the greatest paradox of online mediation is that it imposes an electronic distance on the parties, while mediation is usually an oral form of dispute resolution designed to involve participants in direct interpersonal contact.¹⁰⁵ Mediation is normally a highly informal, face-to-face discussion of issues by disputants and it is vital to create an atmosphere in which the parties trust the mediator to help them reach a resolution of their dispute.¹⁰⁶ For many participants, mediation is about the ‘venting’ of feelings and emotions that they would be unable to express in a more formal setting such as a courtroom.¹⁰⁷ The opportunity to tell one’s version of the case directly to the opposing party and to express accompanying emotions can be cathartic for mediation participants.¹⁰⁸ Online mediation on the other hand is distant and impersonal. Communication by email may make it difficult for the parties and the arbitrator to properly weigh the emotions behind the email. In this way, it is more difficult to evaluate the flexibility of a particular party, or the strength of a party’s feelings or confidence on particular issues.¹⁰⁹ Indeed some authors are of the view that the lack of

¹⁰² Joel B. Eisen, *Are we ready for Mediation in Cyberspace?* 1998 BYU L. Rev. 1305, 1308 (1998)

¹⁰³ Joel B. Eisen, *supra* at 1310

¹⁰⁴ Randall Ralph Titus, University of Cape Town Masters Course ‘*Taming the Wild Web-On-line Dispute Resolution*’ unpublished, p.18

¹⁰⁵ Joel B. Eisen, n.99, p.1310

¹⁰⁶ *ibid.*, p.1312

¹⁰⁷ *ibid.*, p.1323

¹⁰⁸ *ibid.*, p.1323

¹⁰⁹ *ibid.*, p.1311

personal presence in online mediation can make it more difficult for the mediator to maintain effective control over the negotiating parties.¹¹⁰

In addition to the foregoing, online mediation may put parties with limited computer skills at a disadvantage while giving parties well conversant with computers an unfair advantage. That is not all; in addition to computer skills there is need for accessing online computers that may not be readily available to some of the parties.

Online mediation also raises issues of confidentiality. The pillar of mediation is confidentiality. In traditional mediation, no record of the proceedings is kept while in online mediation a record of the proceedings is automatically generated by the nature of communication. This could enable a party to print out and distribute email communications easily and without the knowledge of the other party.¹¹¹ The fear of confidential information being distributed may hinder the development of open and honest exchanges in online mediation.¹¹²

1.4.3.4 Online Jury Proceedings

Some ODR providers have sought to put decision-making for online disputes back in the hands of juries.¹¹³ Two firms, Cyberjury.com and iCourthouse.com¹¹⁴, pioneered the use of modified online jury proceedings to render verdicts in a wide range of disputes. Cyberjury.com no longer has a website. iCourthouse continues to resolve both online and offline disagreements. The provider currently offers adjudication and dispute evaluation (jury smart).¹¹⁵

Under the iCourthouse process, the complainant registers on the site and completes an electronic claims form in which the party provides a brief summary of the facts of the

¹¹⁰ The Pros and Cons of Online Dispute Resolution: An assessment of cyber-mediation websites

¹¹¹ The Pros and Cons of Online Dispute Resolution: An assessment of cyber-mediation websites

¹¹² Ethan Katsh, Dispute Resolution in Cyberspace, 28 Conn. L. Rev. p.971

¹¹³ Lucille M. Ponte, supra n. p.83

¹¹⁴ <http://www.i-courthouse.com> last viewed on 22nd September 2005

case and determines whether the case will be resolved through a peer jury or a panel jury. A peer jury case is open to the general online public and an unlimited number of registered jurors can review the evidence, ask the parties questions, and render a verdict.¹¹⁶ A panel jury case is private with a limited number of online jurors chosen from the jury pool based on the parties' specified demographics.¹¹⁷

The service requires agreement by the parties to use it for resolution of their dispute. Following a complaint if the defendant has agreed to use iCourthouse, the defendant is summoned to the site by e-mail and must register within ten days of the summons. Should the defendant fail to respond within the prescribed time, then the jurors may render a verdict based on the information provided solely by the plaintiff.¹¹⁸

Within seventy-two hours of registering, each party completes a trial book, which includes opening statements, supportive evidence, trial arguments, citations to legal authorities, and jury instructions.¹¹⁹ After the completion of the trial books, registered jurors review the trial books online.¹²⁰ The online jurors may ask the parties questions and then may render verdicts along with any comments or feedback for the disputants.¹²¹ The parties determine how long the jurors have to deliberate and determine what proportion of the verdicts will signal a victory in the case.¹²² The parties have the freedom to choose whether the jury decision would be binding or merely advisory.

¹¹⁵ www.i-courthouse.com last viewed on 22nd September 2005

¹¹⁶ Lucille M. Ponte, *supra*, p.84

¹¹⁷ *ibid.*

¹¹⁸ See iCourthouse Rules of Procedure, Rule 4, available at http://www.i-courthouse.com/main.taf?area1_id=about&area2&uscore;id=rulesofproc (last viewed on 22nd September 2005)

¹¹⁹ iCourthouse Rules of Procedure, Rule 5

¹²⁰ iCourthouse Rules of Procedure, Rule 7

¹²¹ Lucille M. Ponte, *supra*, p.85

¹²² The parties can decide whether a simple majority, two-thirds, or some other proportion wins the case.

Although iCourthouse incorporates the traditional notion of judgment by peers, certain core aspects of the program need to be addressed to ensure fundamental fairness for all parties and to provide full protection of consumer rights in online consumer disputes.¹²³

It is important that the jury pools are screened for bias. It would be inappropriate for jurors in league either with the online consumer or the e-merchant to participate in rendering the verdict.¹²⁴

Second, an e-merchant is more likely to have legal counsel than an online consumer. The fact that the parties prepare their own trial books poses the problem of the online consumer's rights not being adequately protected as an e-merchant who could most likely have legal counsel would be in a better position to make thorough and authoritative trial books compared to the consumer.

In addition to the foregoing the evidence in trial books is not screened for admissibility, which may mean that documents and information, which are irrelevant, misleading, inaccurate, or unauthentic, may be used to support a party's case.¹²⁵

Perhaps most important is the fact that there is no method for ensuring party compliance with iCourthouse verdicts short of bringing a case to the courts for enforcement.

If the above factors were looked into appropriately, online jury trials would be a good form of settling disputes as they provide peer judgment.

1.4.3.5 Cybercourts

The term 'cybercourts' refers to court proceedings that take place mainly online.¹²⁶ Singapore in 2000 initiated a court-based online mediation known as the e@dr, for

¹²³ Lucille M. Ponte, *supra*, p.86

¹²⁴ *ibid.*

¹²⁵ *ibid.*

¹²⁶ G. Kaufmann-Kohler and T. Schultz, *supra*, p.40

parties in an e-commerce transaction to resolve their disputes on the Internet. The Singapore subordinate courts implement the programme. Although it is not litigation, it is a court proceeding, the mediator being a magistrate, either a court mediator or a judge acting as mediator.¹²⁷

Under the e@dr proceedings, the complainant files a complaint by submitting an online Request for Mediation form, stating the party's particulars, the complaint and the brief facts relating to it, and proposed solution.¹²⁸ Within 3 days of receiving the completed form for Request for Mediation, the respondent is given a notice of the complaint. If the responding party does not wish to resolve the dispute by e@dr, or does not respond within a certain time set by the moderator, the requesting party is notified, and the matter is terminated.¹²⁹ If the responding party agrees to e@dr, the party would then submit a Response form, within 1 to 4 weeks, depending on the nature and complexity of the matter, stating the party's particulars, version of events and proposed solution. The parties are then notified of the forum for resolution, which is based on the nature and complexity of the dispute.¹³⁰ With the parties' consent the dispute may be channeled to the Small Claims Tribunal (SCT), the judge-mediator at CDRI and e.CDRI, Singapore Mediation Centre (SMC) or Singapore International Arbitration Centre (SIAC). All communication is via email.

There are other cybercourt projects in the pipeline. For example the State of Michigan vide House Bill 4140(2001) Public Act 262 of 2001 makes provision for a cybercourt with jurisdiction over business disputes exceeding USD25 000.¹³¹ The operation of the cybercourt in Michigan is still awaiting approval of the necessary court rules by the Michigan Supreme Court. Malaysia is also planning to launch a cybercourt.¹³²

¹²⁷ *ibid.*

¹²⁸ Paragraph 1 of the procedural rules of e@dr. The rules may be accessed at <http://www.e-dr.org.sg> accessed on 19th May 2005

¹²⁹ Paragraph 2 of the procedural rules

¹³⁰ Paragraph 3 of the procedural rules

¹³¹ House Bill 4140(2001) Public Act 262 of 2001, paras. 8001(1)(b)

¹³² G. Kaufmann-Kohler and T. Schultz, *supra*, p.40

The advantage of cybercourts over offline proceedings is that of convenience. Cybercourts offer twenty-four hour accessibility from home. The fact that the court can be accessed from home is very beneficial to parties whose businesses or residences are far from the court.

Cybercourts not only have advantages over offline methods of settling disputes but also over other private online ADR methods. As opposed to negotiation and mediation, which may result in a settlement or nothing, court litigation will necessarily produce a judgment (the same is true for binding arbitration).¹³³ Moreover there is the element of public accountability in courts that is lacking in private justice.¹³⁴ Further, the fact that judges, court mediators or magistrates, all of whom are held with high esteem, handle the cases enhances the perceived legitimacy in the process. All these advantages foster trust in the process thus promoting confidence in ecommerce.¹³⁵

1.4.3.6 Online Arbitration

Online arbitration is arbitration conducted at least partly through electronic means such as the Internet.¹³⁶ Online arbitration has the same characteristics as offline arbitration discussed in section 1.1.3 above. It is, in other words, a private substitute to court litigation; the functions of a judge and an arbitrator are the same, only the sources of these functions differ.¹³⁷

ADR methods except arbitration are often not effective enough, because they produce case outcomes that are not legally binding enough.¹³⁸ These methods, if at all successful,

¹³³ *ibid.* p.42

¹³⁴ *ibid.*

¹³⁵ *ibid.*

¹³⁶ Richard Hill, Online Arbitration: Issues and Solutions accessed at www.umass.edu/dispute/hill.htm viewed on 20th June 2004

¹³⁷ G. Kaufmann-Kohler and T. Schultz, *supra*, p.29

¹³⁸ Thomas Schultz, 'Online Arbitration: Binding or Non-Binding?' Accessed at <http://www.online-adr.org> viewed on 22nd September 2005

end into settlements and settlements are mere contracts. For such settlements to be enforceable by state authorities they require a judgment, which is often too expensive to obtain. The expense may prohibit the victor from seeking enforcement in court. With arbitration recourse to courts is only minimal and therefore much less expensive.¹³⁹

Arbitration is therefore deemed to be the most achieved form of dispute resolution, because of its judicial nature, the strict conditions of due process that are applicable, its binding character and the ease of enforcement of its outcomes, and the assistance that courts are legally required to provide in arbitration procedures.¹⁴⁰ In addition to binding arbitration, is non-binding arbitration. Non-binding arbitration is a widely practiced form of ODR. In addition to the attributes of traditional arbitration, online arbitration brings with it the speed and capacity to surpass borders of the Internet.

1.4.3.6.1 Advantages of online arbitration

As with offline arbitration, online arbitration has various advantages for the users. Online arbitration allows the technological capabilities of the Internet to be directed to the challenge of responding to disputes.

1.4.3.6.1.1 Cost saving

Resolution of disputes on line bridges distances between disputants. An online merchant is able to have complaints by consumers in distant territories finally solved online without anyone having to travel the distance. Online arbitration results in cost savings associated with travel and venue expenses as well as attorneys' fees. Since in online arbitration documents may be communicated electronically there are savings on postage costs.

¹³⁹ *ibid.*

¹⁴⁰ G. Kaufmann-Kohler and T. Schultz, *supra*, p.26 quoting P. de Locht, 'Les modes de reglement extrajudiciaries des litiges' in E.Montero (ed.), *Le commerce electronique europeen sur les rails?: analyse et proposition de mise e oeuvre de la directive sur le commerce electronique* (Bruylant-Cahiers du no.19, Bruxelles, 2001), p.338

1.4.3.6.1.2 Accessibility

Disputants resolving their disputes on line are able to pick their neutrals from a variety of experts. This enables parties to access experts that would otherwise not have been available to them in their geographical areas or would have been very expensive to get them there. Being able to have an expert as adjudicator brings quality to the decision leaving the parties more satisfied with the decision than they would have been had their case not been decided by an expert. This as a result makes decisions easier to implement.

There is improved access to justice for some groups by mitigating disadvantages such as geographical isolation, confinement or imprisonment, disability, threat of physical violence, shyness in face-to-face settings and socio-economic status cues.¹⁴¹

1.4.3.6.1.3 Convenience

Online arbitration gives disputants who require their dispute to be adjudicated the convenience of being able to do it wherever they wish it done. They can do it in the comfort of their homes, offices, on holiday and at any time because the service is available twenty-four hours seven days a week. When asked ‘what were the most important aspects taken into consideration when developing American Arbitration Association (AAA) website?’ Debi Miller-Moore said that, ‘convenience, user-friendliness, and transparency together form one very important issue’.¹⁴² The fact that the parties are engaged in the process in an environment that they are familiar and comfortable with removes strain and as a result makes it easier to implement decisions. This may, however, have its drawbacks that will be discussed later.

¹⁴¹ Melissa Conley Tyler and Di Bretherton, n.56, p.207

¹⁴² Debi Miller-Moore, Vice President of ecommerce Services at the American Arbitration Association. This is an extract from an interview with the researchers. The research findings form the core of, G. Kaufmann-Kohler and T. Schultz book on, *Online Dispute Resolution-Challenges for Contemporary Justice*, n.46. The interview appears at p.293.

1.4.3.6.1.4 Flexibility

Online arbitration like its offline counter part is flexible and therefore the advantages discussed in 1.2.4 above also apply to it. The parties are able to determine the rules to apply to their dispute. The parties may validly choose to have compressed proceedings to save on time. In addition to this most of the websites have expedited procedures¹⁴³ that may be employed if protracted processes are not necessary depending on the complexity of the case.

1.4.3.6.1.5 Avoidance of complex jurisdictional issues

Cyberspace transverses geographical borders making parties domiciled in different jurisdictions transact at just the click of the mouse. It is inevitable in society that these transactions may result in disputes. Being in different jurisdictions would make the parties face problems relating to what law to apply to their dispute or which court to file the dispute. And yet the parties would like to have their dispute adjudicated. Online arbitration offers the parties an avenue of adjudicating these disputes without having to worry about which court to go to or which law to apply.

1.4.3.6.1.6 Binding decisions

The high settlement rates of consensual non-adjudicative dispute resolution mechanisms do not indicate they are effective; they only show that those parties willing to negotiate or mediate often reach a settlement.¹⁴⁴ However many people are not willing to negotiate or mediate and insist on having a third party decide who is right.¹⁴⁵ This is what called for the courts in the first place. Arbitration is the least alternative form of dispute resolution; it is the extra-judicial dispute resolution process that resembles court proceedings most closely: it is quasi-judicial dispute resolution.¹⁴⁶

¹⁴³ For example the AAA and AFSA have expedited rules that may be employed in non complex cases

¹⁴⁴ G. Kaufmann-Kohler and T. Schultz, *supra*, p.27

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.*

Cyberspace is a consensual environment; it calls for consent based dispute resolution and not courts.¹⁴⁷ Online Arbitration offers the most favourable form of dispute resolution for the disputants who are not willing to negotiate and require a third party to make a decision for them.

Arbitration awards unlike settlement agreements resulting out of other ADR methods are binding on the parties and can be enforced through the court system. This makes online arbitration as a means of dispute settlement effective.

1.4.3.6.1.7 Speed

Online arbitration has the advantage of the technologies available making it possible for the providers to comply with fundamental principles of procedure while at the same time operate fast.¹⁴⁸ The means of communication coupled with the fact that the websites may be accessed at any time brings speed to online arbitration processes. In addition to this the arbitrator may for cases that need an expeditious decision restrict or vary the time within which to perform certain obligations by the parties. Most of the ODRSPs make provision for expedited procedure. ODRSPs should however not compromise due process to achieve speed.

In addition to the foregoing unlike offline arbitration online arbitration does not face problems of scheduling an arbitration hearing which can be time-consuming, with phone, fax and post being the common communication means. Even in the rare cases that an online hearing or videoconferencing need to be scheduled it is never as big a task because there is no need to get the parties to meet in one venue and the use of e-mail simplifies the task.

¹⁴⁷ *ibid.*

¹⁴⁸ Esther Van den Heuvel, “Online Dispute Resolution as a solution to Cross-Border E-Disputes, an introduction to ODR” p.9 Accessed at www.oecd.org/dataoecd/63/57/1878940.pdf on 23rd January 2006

1.4.3.6.2 Disadvantages of online arbitration

Online arbitration shares most of the disadvantages of its offline counterpart that were discussed in section 1.3 above. Like offline arbitration, online arbitration has the disadvantages of: capability of being employed as a means of stalling court proceedings; could turnout to be very expensive if improperly handled; it lacks judicial precedent; lack of appeal except for the allowance of setting aside the decisions in very limited circumstances; it may be inappropriate for some cases and the likelihood of a compromised decision

In addition to the above disadvantages, online arbitration faces problems of privacy, security and confidentiality as well as recognition and enforcement of its outcomes. The issues of privacy and confidentiality will be discussed under the section on legal issues in online arbitration while the recognition and enforcement of online arbitration outcomes will be discussed under the section on obstacles to online arbitration.

CHAPTER TWO

ONLINE ARBITRATION PRACTICE AND THE LEGAL ISSUES INVOLVED

2.1 ONLINE ARBITRATION PRACTICE

There are over 25 ODRSPs offering services either labeled ‘arbitration’ or resembling arbitration.¹⁴⁹ Some of the providers offer both binding and non-binding arbitration while others offer one or the other.¹⁵⁰ While some of the providers cover all kinds of disputes and in any field, others restrict themselves to particular types of disputes and/or fields.¹⁵¹

Each ODRSP has a set of rules, terms and conditions that the parties are required to read and understand before filing claims with the ODRSP. In order to warn the parties that their involvement implies submission to rules that are specific to arbitration procedures, which are not those of national courts, the systems require the party to click on a specific field indicating that they have read and accepted the terms of arbitration and know the rules they will be bound by.¹⁵²

It is important to note that some of the providers offer arbitration as a secondary procedure. These providers usually advise the parties to start with mediation and if the

¹⁴⁹ G. Kaufmann-Kohler and T. Schultz, *supra*, p.34, 249-277. According to a survey carried out in an interdisciplinary project conducted by Private International Law Department of Geneva University Law School and the Informatics Centre of the same University that run from 2000-2003 the following entities were found to be offering online arbitration: the AAA; the ADR Group; ARyME; BBBOnline; JAMS; MARS; NovaForum; the Online Public Dispute Project; Online Resolution; the Private-Judge.com; Resolution Canada; the Resolution Forum; SettleTheCase; SquareTrade; the Virtual Magistrate; Web Assured; Web Mediate; Word and Bond and the four ICANN-approved providers(WIPO; the National Arbitration Forum; the Asian Domain Name Dispute Resolution Centre; and the CPR Institute for Dispute Resolution). It should be noted that there are other institutions at country level that arbitrate domain name disputes following the UDRP guidelines.

¹⁵⁰ For example the AAA offers exclusively binding arbitration while the UDRP providers, the Virtual Magistrate, the iCourthouse offer only non-binding arbitration.

¹⁵¹ For example AAA handles a wide range of disputes in areas like consumer, commercial, insurance, employment and domain names. MARS too handles a wide variety. ECODIR handles only B2C ecommerce disputes only. Meanwhile others like WebMediate only handle B2B disputes

parties fail to reach a settlement during this process then the matter is arbitrated. For example at NovaForum the parties have a choice between mediation, arbitration and med-arbitration.

The following subsections review the current practice of both binding and non-binding online arbitration in a cross section of ODRSPs. The process is studied chronologically i.e. from the requisitions for filing a case right through to obtaining the arbitral award.

2.1.1 Filing the complaint

Arbitration is a voluntary procedure and as such the parties must have agreed to it. All the ODRSPs studied request for the agreement to arbitrate from the parties wishing to file a case. Some providers accept the case on presentation of an electronic agreement to arbitrate while others require a fax of the agreement¹⁵³ or the paper document in addition to the electronic agreement.¹⁵⁴

Another consideration is that of arbitrability. Most of the terms and conditions state that the ODRSPs shall not arbitrate any disputes that they consider incapable of being resolved by arbitration.¹⁵⁵

The process commences with the claimant submitting an online notice of claim or notice of arbitration. The manner of serving the notice of arbitration differs from ODRSP to ODRSP. Some providers require that the notice is submitted to them and then they in turn communicate it to the defendant(s) after satisfying themselves that it fulfils their stipulated requirements.¹⁵⁶ In this case the provider is responsible for the service of notice and as a result embarks on the arbitration proceedings sure that the defendant was served with notice. In other instances the claimant communicates the notice to both the

¹⁵² Debi Miller-Moore, see n.142 above

¹⁵³ Novaforum requests for a fax of the agreement to arbitrate

¹⁵⁴ ICANN's UDRP Rules require the paper agreement.

¹⁵⁵ For example the NAF terms and conditions, rule 1(b) provides that '....will not arbitrate matters that are not deemed fit for arbitration by law....'

¹⁵⁶ See AAA rules for Online Arbitration under rule 4; TrustEnforce rules 3 and 4; Nominet.uk rule 2

provider and the defendant simultaneously in which case responsibility of proof of service lies with the claimant.¹⁵⁷ While other providers require the claimant to submit the notice to them and after satisfying themselves that it complies with their requirements give the claimant a go ahead to notify the defendant. Some ODRPs provide examples of what form the notice should take but it generally includes: the particulars of the parties; the cause of action and how it arose; reference to the arbitration agreement; a demand to settle the dispute by arbitration and the relief sought.

The notice of arbitration is followed by the claimant submitting an online statement of claim to the ODRSP who then, if the claim fulfils the procedural requirements, communicates it to the defendant. The statement of claim states the claimant's case. Some ODRSPs, however, allow the notice of arbitration to be submitted together with the statement of claim.¹⁵⁸

2.1.2 Filing a defence, counter claim and other documents

The claimant's submissions, which are contained in the statement of claim, are communicated to the defendant who in turn if they choose to participate in the proceedings submits a statement of defence to the provider. The statement of defence may in some instances have a counter claim in which case the claimant would be entitled to a statement of defence to the counter claim to which the defendant is given a chance to reply.

All the ODRSPs have provisions relating to time periods in their procedural rules. Each ODRSP defines the manner in which time is calculated and most of them use the concept of 'days' to define the period allowed for the submissions.¹⁵⁹ Some ODRSPs allow a system of 'hours' to define the time period that is allowed for submissions.¹⁶⁰ The

¹⁵⁷ LCIA Arbitration Rules art.1(1.1)(g)

¹⁵⁸ For example the CACNIQ Arbitration Rules, Rules 11 and 12 allow the statement of claim to be submitted with the notice of arbitration.

¹⁵⁹ P.G. Esselaar, *supra*, p.41

¹⁶⁰ *ibid.*

parties are alerted by email when any new submission is made.¹⁶¹ Most of the ODRSPs give the arbitrator the leeway to vary the time periods if they deem it fit to do so.

As far as total duration of the arbitration is concerned it varies from provider to provider and on the complexity of the case. The existing time limits vary between a few hours and seven weeks, the most common durations however seem to be between a few days and two weeks. Some providers allow for a four hour resolution session¹⁶² while others state that a typical arbitration might last from three to ten days but may last longer in complex cases.¹⁶³ Meanwhile other providers give the time limits in hours.¹⁶⁴

The ODRSPs require all the documents in support of a party's case to be submitted by the party to the provider who in turn makes the document available on the website for the parties to access. When it comes to documents in the possession of the other party, the majority of the ODRSPs allow either the arbitrator or the relevant party to request for the document.¹⁶⁵ The other providers require the party who requires the document to request for the submission of that document.¹⁶⁶

The ODRSPs give room for amendment of submission just like in offline ADR. The arbitrator has the powers to award extra time when requested and deemed necessary. While some ODRSPs give the duty of directly indicating to the parties the closure of

¹⁶¹ This is a feature that is common to almost all the ODRSPs

¹⁶² NovaForum allows for a four hour resolution session. If the parties elected the option of med-arb then the first two hours would be dedicated to mediation. If the parties do not reach a settlement during this time then the in the remaining two hours the parties would participate in an arbitration process. The rules can be accessed at www.electroniccourthouse.com/stepped_procsc.html viewed on 20th June 2005

¹⁶³ Private Judge <privatejudge.com/faq.asp#HOWLONGARB.ARB>

¹⁶⁴ The Virtual Magistrate provides that the arbitrator will attempt to reach a decision as quickly as or within 72 hours of acceptance of a complaint. They however go on to provide that this is a goal and it may not be possible to resolve all cases within that time. When necessary or appropriate to maintain fairness, the time-limit may be extended by the arbitrator with or without the agreement of the parties. www.vmag.org/docs/rules.html

¹⁶⁵ Examples of these are: the WIPO Arbitration rule 48; UNCITRAL Arbitration rule 24(3); Article 20(b) of the Trust Online Arbitration Rules

¹⁶⁶ For example arbitration rule 9 of TrustEnforce.org

submissions¹⁶⁷ after which point no more amendments of submissions are allowed to the arbitrators, others send the notice of closure of submission to the parties. Whether or not the parties abuse the process will therefore be dependant on the skills of the arbitrator.¹⁶⁸

2.1.3 Law applicable

Merchants in the same country trade with each other in accordance with the laws of that country, but when they are in different countries their contract is an international one. The identification of the law governing an international contract is guided by the rules of private international law (PIL) or conflict of laws which differ from country to country. Therefore the necessity to decide which PIL is applicable should always be borne in mind.

When it is a court taking a decision there are no problems as a court is obliged to apply the law of its own country, including its own country's PIL rules which may require it to apply the law of another country. But international arbitrators because they have no *lexi fori* must decide fairly which PIL rules to apply.

The substantive law¹⁶⁹ of the contract is determined by the PIL. The parties may in their contract choose the law applicable to their contract or it may be implied or in the absence of express or implied choice in the contract the arbitrator will determine the law applicable. The choice must be *bona fide*, legal and its enforcement must not be contrary to public policy. The PIL rules applicable in South Africa, the Common Wealth, the United Kingdom and Europe are almost identical.¹⁷⁰

¹⁶⁷ Examples of these are article 57 WIPO arbitration rules, article 31 BCICAC arbitration rules, and article 29 of the UNCITRAL arbitration rules.

¹⁶⁸ P.G. Esselaar, *supra*, p.62

¹⁶⁹ In *Amin Rasheed Shipping Corp v Kuwait Insurance CO* [1984] AC 50 it was held that the search is for 'proper law': the law which governs the contract and the parties' obligations under it; the law which determines (normally) its validity and legality, its construction and effect, and the conditions of its discharge'.

¹⁷⁰ Forsyth, *Private International Law*, p.284

The practice is such that if the parties have chosen or implied a law to apply to their contract then the parties' choice¹⁷¹ is respected except if it is not *bona fide*, legal or its enforcement would be contrary to public policy¹⁷² in which case the arbitrator would determine with which system of law the contract is most closely connected.¹⁷³

2.1.4 Arbitration seat

Questions of procedure are governed by the *lex fori*, the law of the court's country or state.¹⁷⁴ An arbitration tribunal is in a similar position. The arbitral law of the place or seat of the arbitration will govern its procedure. It is therefore important for the parties to choose a seat of arbitration. When the parties have chosen a seat of arbitration then the ODRSP take the parties' choice as the seat. Otherwise when the parties are quiet the arbitrator determines the seat. Some ODRSPs simply indicate that their arbitration rules shall apply and also indicate the law to govern the dispute.¹⁷⁵

2.1.5 Choosing the arbitrator

The practice is that the parties to the dispute either choose their arbitrator,¹⁷⁶ or the parties choose the arbitrator from a list provided by the ODRSP,¹⁷⁷ or the ODRSP or an external body chooses the arbitrator.¹⁷⁸

¹⁷¹ According to Art.3.1 of the Rome Convention on the Law Applicable to Contractual Obligations which also reflects the common law position, 'A contract shall be governed by the law chosen by the parties.

¹⁷² According to article 15.2.1 of the AFSA arbitration rules, the arbitrator will respect the choice of law of the parties only if it is not contrary to 'principles of public policy or natural justice'.

¹⁷³ Art. 4.1 of the Rome Convention

¹⁷⁴ The reason given by Lord Pearson in *Boys v Chaplin* [1971] AC 356 394 is "The *lexi fori* must regulate procedure, because the court can only use its own procedure, having no power to adopt alien procedures."

¹⁷⁵ For instance Word&Bond provides that English Law will govern the dispute.

¹⁷⁶ Here the providers do not restrict the parties to a list of arbitrator from which an arbitrator or arbitral tribunal must be chosen, examples of such providers are; CACNIQ (article 17) and AMIC. The providers however offer to provide the parties with a list to choose from should the parties so wish.

¹⁷⁷ Under this category the ODRSP gives a fixed list from which the parties may choose an arbitrator or arbitral tribunal. For instance the AAA Commercial Arbitration Rule 13 provides for a fixed list but nonetheless the parties are allowed to choose another arbitrator if that was what was agreed in the arbitration agreement.

¹⁷⁸ Some ODRSPs simply provide that the provider will appoint an arbitrator. This is the case with providers like ECODIR and the Virtual Magistrate.

When the parties are to choose the arbitrator if it is a single arbitrator the parties may mutually agree on the arbitrator failing which the ODRSP chooses the arbitrator and if the parties require a tribunal then each party chooses one arbitrator and the two arbitrators then choose a third arbitrator who assumes the duty of chairman of the tribunal. This process would, however, not work when it is multiple parties involved. In cases of multiple parties who are not able to agree on an arbitrator or cannot engage the above procedure of appointing a tribunal, the ODRSP chooses the arbitrator.¹⁷⁹ Some ODRSPs follow the UNCITRAL arbitration rules.¹⁸⁰ Under these rules when parties fail to agree on an arbitrator the provider gives each of the parties an identical list from which to list their choice in order of preference.¹⁸¹ The most acceptable arbitrator to both the parties is appointed.

The parties have the option of having more than one arbitrator depending on the complexity of the case. This however is followed by the payment of a higher fee than if a single arbitrator was to be engaged.¹⁸²

The ODRSPs provide for avenues of challenging and replacement of an arbitrator if there are circumstances that give rise to justifiable doubts as to the arbitrator's impartiality or independence, or if the arbitrator does not possess the qualifications agreed to by the parties.¹⁸³

2.1.6 The proceedings

The most important aspects to note under this stage are: the hearing itself, the evidence, witnesses, experts, queries by the arbitrator and privacy and confidentiality.

¹⁷⁹ Examples of this are the SIAC Arbitration Rule 9 and the WIPO rules in article 18

¹⁸⁰ WIPO rules on choice of arbitrator are similar to the UNCITRAL rules

¹⁸¹ UNCITRAL, Rule 6 and WIPO rule 19

¹⁸² Look at annex B which shows the varying charges

2.1.6.1 Hearings

In an online environment it is impossible to have a hearing the way it is understood in offline ADR. It is important to note that most of the communication in online arbitration is asynchronous employing asynchronous tools such as email and other web-based communications. Most of the cases are decided on a document only basis. This is where the arbitrator bases their decision on the documents submitted by the parties.

In some of the cases some of the providers employ other tools other than the asynchronous ones.¹⁸⁴ The tools being employed for electronic hearings are videoconferencing, chats and other web-based communications. Some providers employ offline communication tools like teleconferencing and live in person hearings.¹⁸⁵ Some of the providers limit the communications between the parties and the arbitrator to email only.¹⁸⁶

2.1.6.2 Queries

Some providers have made provision for the arbitrator and the parties to ask questions if they wish. Some providers put a specific period¹⁸⁷ within which the questions may be asked while others allow the arbitrator to ask questions at any time¹⁸⁸ during the process.

¹⁸³ Many ODRSPs have incorporated these provisions of article 12(2) of the UNCITRAL Model Law

¹⁸⁴ For example at MARS and NovaForum offer other web-based communication like chats, they also offer videoconferencing but this is done in exceptional cases

¹⁸⁵ For example at AAA they allow in person live hearings. When asked whether they had resolved all their disputes on line Miller-Moore said that “The possibility to handle cases entirely on line from filing to the rendering of the award does exist with AAA Webfile. However, the parties so far have preferred to file their submissions, make payments, and select their arbitrators online, but then prefer, as they are allowed to do, to hold offline hearings. Interview notes produced in at G. Kaufmann-Kohler and T. Schultz, *supra*, p. 294

¹⁸⁶ An example of these is the Virtual Magistrate.

¹⁸⁷ According to rule 11 of TrustEnforce the arbitrator may ask supplementary questions after the closure of submissions.

¹⁸⁸ For example WebMediate allows the arbitrator to ask questions at any time.(rule 18)

2.1.6.3 Witnesses and experts

The providers that offer a full range of options may in some circumstances make arrangements to have videoconferences or in person hearings to take evidence from witnesses. Otherwise evidence from witnesses is taken by means of statements that are submitted by the relevant parties to the provider's website. If the arbitrator has questions relating to witnesses' statements they may pose these questions through email.

Most ODRSPs make provision for the arbitrator to appoint experts if there is need for them.¹⁸⁹ Some of the providers specifically empower the arbitrator to order inspection by an expert.¹⁹⁰

2.1.6.4 Privacy and confidentiality

Currently the online arbitration proceedings are private and confidential. Outsiders are not allowed to access nor attend the hearings. Prior to and during the proceedings, no information is published and no list of pending arbitration is available, except under the UDRP.¹⁹¹ As an exception to the other ODRSPs, UDRP providers are under duty to publish all decisions in full text naming the parties, on the internet. A panel may however in exceptional circumstances decide not to have the decisions publicized.¹⁹² The UDRP providers are also under duty to display the list of all pending cases.

Most providers do not publish the award or any excerpts thereof. Some providers like the Virtual Magistrate publicize summaries of decisions on its website as a way to create a precedent. There seems to be no prior consent of the parties to the publicizing. Other providers like WebMediate publicize decisions with the consent of the parties. Meanwhile providers publicize the statistical data.

¹⁸⁹ Articles 55, 27 and 24 of WIPO, UNCITRAL and SIAC arbitration rules respectively.

¹⁹⁰ Art. 21 of the LCIA arbitration rules, art. 20 and 29 of the BCICAC arbitration rules, Art. 50 of the WIPO arbitration rules.

¹⁹¹ G. Kaufmann-Kohler and T. Schultz, *supra*, p.53 also look at the UDRP Rules

2.1.7 The award and its enforcement

Some of the providers like the Fordjourney offer optionally binding arbitration while others like the UDRP providers offer purely non-binding arbitration.¹⁹³ Details of the kinds of arbitration offered by the different providers are stated in annex B.

With the exception of ICANN's UDRP programme, which is discussed in chapter three, most of the providers of online arbitration leave the enforcement of the award to the awardees. When asked whether AAA monitors compliance Debi Miller-Moore stated that: "The case manager does monitor the work of the arbitrators, but there is no feedback on whether the parties have complied with the award that has been rendered." ¹⁹⁴

Meanwhile the Chartered Institute of arbitrators seems not to have had problems related to compliance because backing is provided by the accrediting association and the reputation of the traders. Therefore in a B2C dispute if it is the business that loses the case, it is under pressure to comply or else it might be excluded from the trade association which would be of very serious consequences.¹⁹⁵

2.1.8 Costs and financing

Low costs are considered one of the prime advantages of ODR. Generally, costs of private dispute resolution services are a compound of the costs of the dispute resolution institution, the fee and the costs of the neutrals and the costs of the parties.

There are three financial models in ODR. In some instances the providers employ bilateral (both parties share the fees) while in others unilateral (one party bears the fees) user fees are employed and yet in others there are external (other sources other than the parties) sources of funding. Some providers employ a mixture of models.

¹⁹² Look at Art.4(j) UDRP Policy and 16(b) UDRP Rules

¹⁹³ Thomas Schultz, *supra*, n.137,p.7

¹⁹⁴ n.185

The fees payable differ from provider to provider.¹⁹⁶ Most of the providers include a schedule of the fees in their rules and require that the fees are paid up front.¹⁹⁷

2.1.9 Communication tools

The different providers employ different means of communication for different methods of dispute resolution. In online arbitration the neutrals do not base their decisions on their perception of the parties' interests and concerns, but on facts as proven and on the applicable rules.¹⁹⁸ As a result of this the communication means in online arbitration serve to transmit the facts, arguments and documentary evidence to the arbitrator and the other party.

The providers studied employ a variety of communication tools. These include: emails, and web-based communications like web-based platforms and chat rooms. The providers also employ offline communications tools such as fax, teleconferencing, videoconferencing, and live in person hearings. Some providers like the VMAG restrict the means of communication to only emails.¹⁹⁹

After looking at the procedure of online arbitration it is important to look at the legal issues that arise as a result of these procedures.

¹⁹⁵ Gregory Hunt, manager of the Dispute Resolution Services of the Chartered Institute of Arbitrators, in an interview reported in G. Kaufmann-Kohler and T. Schultz, *supra*, at p.298

¹⁹⁶ It is generally agreed that the amount is dependant on the following factor: the complexity of the case, the time required for the process, the number of arbitrators, the amount disputed or the value of the subject matter, in the case of domain name disputes, the number of domain names in dispute and the number of panelists requested, the specialty or experience of the neutral, the type of hearing, whether it is consumer or a business, whether the fees are subsidized by any other body

¹⁹⁷ The details of the fees charged by some of the providers reviewed are laid out in annex B

¹⁹⁸ G. Kaufmann-Kohler and T. Schultz, *supra*, p.61

¹⁹⁹ Details of the communication means used by the different providers are given in annex B.

2.2 LEGAL ISSUES

Arbitration is a consensual²⁰⁰ process by which one or more private neutrals chosen by the parties resolve a dispute by way of a binding²⁰¹ decision following fundamental principles of procedure.²⁰² There has been increasing interest in the question whether an arbitration conducted by the use of electronic means is valid within the current legal framework provided by national laws and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (NYC).²⁰³

2.2.1 Arbitration agreement

Consensual arbitration is a voluntary procedure that the parties to a contract may opt for as a means of resolving disputes that may arise out of their contractual relationship. Agreement to arbitrate by all parties to a transaction is therefore mandatory. Consensual arbitration is the creature of contract. Without the agreement of the parties therefore, there can never be arbitration. The arbitrator or arbitral tribunal derive jurisdiction from the consent or agreement of the parties. Indeed consent is the basis of arbitration²⁰⁴

The requirement for consent raises a number of issues. Some of the issues deal with the conclusion of the contract while others relate to the process itself. At the stage of conclusion of the arbitration agreement the key point to note is the issue of the validity and enforceability of the arbitration agreement.

²⁰⁰ Arbitration may not always be consensual; there can also be nonconsensual arbitration for instance statutory arbitration. This work however is concerned with consensual arbitration.

²⁰¹ As was mentioned in section 1.4.1.6 above, there is non-binding arbitration. Non-binding arbitration is a widely applied form of ODR.

²⁰² G. Kaufmann-Kohler and T. Schultz, *supra*, p.28, quoting A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*(3rd edn, Sweet & Maxwell, Londn,1999), pp3-4

²⁰³ Richard Hill, *supra*

²⁰⁴ G. Kaufmann-Kohler and T. Schultz, *supra*, p.29

The arbitration clause must meet both formal and substantive validity requirements. Under the substantive validity requirements fall the issues of arbitrability²⁰⁵ and consent²⁰⁶ while the issue of form falls under the formal requirements.

2.2.2 Validity and enforceability of B2C arbitration agreements

2.2.2.1 Arbitrability

Arbitrability determines whether a dispute is capable of settlement by arbitration or whether it is to be strictly determined by resort to court litigation. For an arbitration agreement to be effective it must relate to a subject matter which is capable of being resolved by arbitration.²⁰⁷ Accordingly, a dispute is arbitrable if the parties have validly submitted it to arbitration.

2.2.2.2 Arbitrability of consumer disputes

A survey of national laws shows that B2C disputes are arbitrable in most countries, as a large number of the national laws condition the validity of B2C arbitration agreements on specific requirements.²⁰⁸ Some legal systems restrict pre-dispute B2C arbitration agreement and require that for an arbitration agreement in B2C disputes to be valid it must be post-dispute.²⁰⁹

2.2.2.3 Pre-dispute arbitration agreements

All legal systems that accept the arbitrability of consumer disputes consider a post-dispute agreement to submit that dispute to arbitration valid because after the occurrence of a dispute a consumer who chooses to submit that dispute to arbitration would have done so with full knowledge of the circumstances and risks involved. This is however

²⁰⁵ Arbitrability in the sense that the subject matter of the dispute must be capable of settlement by way of arbitration.

²⁰⁶ G. Kaufmann-Kohler and T. Schultz, *supra*, p.138

²⁰⁷ E. Gaillard and J. Savage, *Foichard Gaillard Goldman on International Commercial Arbitration* (Kluwer, The Hague, 1999) para. 532

²⁰⁸ G. Kaufmann-Kohler and T. Schultz, *supra*, p.171-172

²⁰⁹ The English Consumer Arbitration Agreements Act 1998 restricts the validity of pre-dispute arbitration clauses but admits post-dispute clauses.

not the case with pre-dispute counter parts. It is argued that pre-dispute arbitration agreements are often part of adhesion contracts which the consumer may accept, or must forego all transactions with businesses providing such clauses.²¹⁰ If the consumer wishes to enter into the transactions the consumer's only choice is to accept the arbitration clause. The consumer's acceptance of the arbitration clause is forced as such.

For instance in the European Union(EU), the EU Council Directive on Unfair Terms in Consumer Contracts provides that unfair clauses in consumer contracts do not bind the consumer.²¹¹ It should however be noted that the directive does not affect arbitrability. It only prohibits clauses in certain circumstances and only in regard to pre-dispute clauses.²¹² The Directive lists clauses that operate so as to exclude or hinder a consumer's right to take legal action or exercise any other legal remedy, particularly by requiring the consumer to take disputes exclusively to arbitration not covered by legal provisions as unbinding to the consumer.²¹³ The application of the Directive differs from country to country.²¹⁴

Meanwhile the courts in the United States have been very supportive of arbitration. In the USA the agreement to arbitrate will be presumed valid and enforceable unless the consumer establishes that it is invalid because of a traditional contract defence'.²¹⁵

A pre-dispute consumer arbitration clause is therefore valid and enforceable in the United States courts. Parties are however free and have been successful in applying contract defences, mainly of procedural²¹⁶ or material²¹⁷ unconscionability.

²¹⁰ G. Kaufmann-Kohler and T. Schultz, *supra*, p.173

²¹¹ Art. 6 (1) of European Community Directive 93/13/EEC of April 1993, on Unfair Terms in Consumer Contracts.

²¹² G. Kaufmann-Kohler and T. Schultz, *supra*, p.176 quoting J.F.Poudet and S. Besson, *Droit compare de l'arbitrage international*, (Bruylant/LGSJ/Schulthess, Brussels/Paris/Zurich, 2002),p.333

²¹³ Para. Q of the annex to Directive 93/13/EEC

²¹⁴ For instance in France where pre-dispute consumer arbitration clauses are invalid courts have decided that pre-dispute consumer arbitration clauses were valid in international contracts, because French consumer protection laws in matters of jurisdiction do not apply to international situations.

2.2.3 Written form

Most legal systems and international conventions require that an arbitration agreement must be in writing.²¹⁸ Some of the legal systems that require the arbitration agreement to be in writing define writing broadly as to include electronic documents while others are not clear or do not include writing by electronic means. For example, the UNCITRAL Model Law²¹⁹, the South African ECT Act²²⁰, the Singapore Electronic Transaction Act²²¹, the German Zivilprozessordnung²²², the English Arbitration Act 1996²²³, the US Federal Arbitration Act²²⁴ and the Swiss Private International Law Act²²⁵, define writing broadly as to include electronic documents or means.

There has however been a problem of the New York Convention, which makes the following provisions:

Each contracting State shall recognise an agreement in writing under which the parties undertake to submit to arbitration all or any differences which may have arisen or may arise between them in respect of a defined legal relationship, whether contracted or not,

²¹⁵ R.M Alderman, 'Consumer Arbitration in the United States: A System in Need of Reform' (2002) 3 *Revista Latinoamericana de Mediacion y Arbitraje* 118, p.124 translation by G. Kaufmann-Kohler and T. Schultz, *supra* at p.172

²¹⁶ The manner in which a contract was entered may raise procedural unconscionability

²¹⁷ The contents of a contract may be such that they raise material unconscionability. For example a pre-dispute arbitration agreement incorporated into general terms of contract may be deemed unconscionable if it imposes excessive costs on the consumer thus precluding the consumer from seeking relief.

²¹⁸ There are some exceptions like French and Swedish law that do not require the arbitration clause to be in writing.

²¹⁹ Article 7(2) of the UNCITRAL Model Law on International Commercial Arbitration provides that '[A]n agreement is in writing if it is contained in a document signed by the parties or in exchange of letters, telex, telegrams or other means of telecommunication which provides a record of the agreement'

²²⁰ Section 12 of the South African ECT Act.

²²¹ Section 6 of the Singapore Electronic Transactions Act.

²²² The German Arbitration Law is modeled on the UNCITRAL Model Law and gives exactly the same provision.

²²³ Section 5(6) of the English Arbitration Act provides that 'References to anything being in written or in writing include its being recorded by any means'

²²⁴ Art. 2 of the United States Federal Arbitration Act

²²⁵ Art. 178(1) of the Swiss Private International Law provides that 'as to form, the arbitration agreement shall be valid if it is made in writing, by telegram, telecopier, or any other means of communication that establish the terms of the agreement by a text'

concerning a subject matter capable of settlement by arbitration...an exchange of letters or telegrams satisfies the 'agreement in writing requirement.'²²⁶

It is not surprising that the NYC restricted the means of writing to letters and telegrams because these were the means of communication in 1958 when the Convention was signed. Courts have since included telex and faxes²²⁷ in their interpretation of the writing requirement of the NYC. The same evolutive interpretation should lead courts to include emails and other electronic means of communication.²²⁸ The UNCITRAL Working Groups on Arbitration and on Electronic Commerce contemplate securing this result by including into the future Convention on the use of Electronic Communication in International Contracts a reference stating that this Convention applies to the NYC.²²⁹ The draft of the Convention on Electronic Communications in International contracts provides that the writing requirement 'is met by electronic communication if information contained therein is accessible for further reference'.²³⁰

The UNCITRAL Model Law and national laws follow the principle of functional equivalence i.e. if a data message fulfils the same function as a paper document, it should be recognised as equivalent.²³¹

The above provisions raise two questions as far as online arbitration is concerned. One of whether an arbitration agreement entered by exchange of emails messages satisfies the writing requirement of the NYC. The second question is whether an arbitration agreement entered in to by reference through the acceptance of an offer on the web meets the said requirements. These questions will be briefly discussed below.

²²⁶ Article 11(1) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards 1958, accessed at <http://www.uncitral.org/english/texts/arbitration/NY-conv.htm>

²²⁷ G. Kaufmann-Kohler and T. Schultz, *supra*, p.140

²²⁸ *ibid.* p.140 quoting G. Kaufmann-Kohler, *Arbitration agreements in online business transactions*, p.360

²²⁹ Article, A/CN.9/WG.IV.P.110, 18th May 2004

²³⁰ Article 5 of UNCITRAL Model Law on Electronic Commerce provides that: 'Information shall not be denied legal effect, validity or enforceability solely on grounds that it is in the form of a data message'

²³¹ G. Kaufmann-Kohler and T. Schultz, *supra*, p.141

2.2.3.1 Exchange of email messages

Writers like Arsic have argued that an exchange of email messages satisfies the formal requirements of Article II(2) of the NYC with respect to formation of an arbitration clause, because an exchange of emails can be equated to an exchange of telegrams.²³² The argument is correct because even if there are important technical differences between telegrams and emails the essential features of an exchange of telegrams can be reproduced through the appropriate use of email.²³³ Therefore as long as email messages are used in such a way as to be able to have the same function as a paper document then such email messages are recognised as written form.

2.2.3.2 Reference through the acceptance of an offer on the web meets the said requirements

For example when purchasing items on the internet reference is made to terms and conditions which may contain an arbitration clause. The usual practice is for the website to provide a hyperlink to the general terms, which are posted on a separate web page.²³⁴ In many cases, the customer is not required to expressly accept these general terms to proceed to order. Would an arbitration clause contained in the general terms amount to a valid agreement to arbitrate?

Article 5 of the UNCITRAL Model Law on Electronic Commerce provides that: 'information shall not be denied legal effect, validity or enforceability solely on the ground that it is not contained in the data message purporting to give rise to such legal effect, but is merely referred to in that data message'. In this case the offer is presented as an electronic form; the buyer completes certain blank fields, and then initiates a 'submit' or 'transmit' or 'accept' function.²³⁵ Provided the portion of the offer containing the submit' or 'transmit' or 'accept' function clearly and conspicuously

²³² Jasna Arsic, 'International Commercial Arbitration on the Internet' Journal of International Arbitration(Vol. 14,no. 3, September 1997) p.219

²³³ Richard Hill, 'Online Arbitration: Issues and Solutions' accessed at <http://www.umass.edu> viewed on 24th June 2005

²³⁴ G. Kaufmann-Kohler and T. Schultz, *supra*, p.143

²³⁵ Richard Hill, *supra*

referred to the existence of the terms and conditions and stated that the contract was subject to those terms and provided further that a user exercising normal care must be able to review the terms²³⁶ then an arbitration agreement included in such terms was validly formed and incorporated.²³⁷ Absence of clear and conspicuous reference could lead to objections on the basis of lack of informed consent by the buyer.²³⁸

2.2.4 Compliance with Fundamental Procedural Principles

The process need not only have been agreed to but must also comply with the fundamental procedural principles of choice of arbitrator and due process.

2.2.4.1 Choice of arbitrator

One of the fundamental principles relates to the appointment of impartial arbitrators. Arbitration boasts of the party autonomy to appoint the neutral either directly or by referring to an appointing authority to make the appointment on the parties' behalf. As such the parties must have an equal say in the appointment of the arbitrator or the arbitral tribunal. The arbitrator must be impartial and independent from the parties in dispute. Whichever way an arbitrator or arbitral tribunal is chosen the parties must directly or indirectly agree to the method of choosing and the provisions of article 12(1) of the UNCITRAL Model Law on Commercial Arbitration should be put in mind.²³⁹

²³⁶ G. Kaufmann-Kohler and T. Schultz, *supra*, p.145, it is further stated that the user must have the ability to click on a field to scroll through the terms, that field must be well-positioned and easy to locate and the presentation of the general terms must be clear and simple and the terms should be drafted in the same language as the site because the user is expected to understand that language.

²³⁷ *ibid.*

²³⁸ Richard Hill, *supra*

²³⁹ Art.12(1) of the UNCITRAL Model Law on Commercial Arbitration provides that : “.. when a person is approached in connection with his possible appointment as an arbitrator, he shall disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. An arbitrator, from the time of his appointment and throughout the arbitral proceedings, shall without delay disclose any such circumstances to the parties unless they have already been informed of them by him...”

The ODRSPs should therefore ensure that impartiality and independence of the neutrals are enforced strictly. Impartiality and lack of independence of a neutral may lead the successful challenge of the awards.

2.2.4.2 Using electronic means for the arbitration proceedings

Arbitration is a creature of contract and as such the parties may agree on the use of electronic means for the conduct of the arbitration proceedings. Parties may equally exclude the use of electronic means. If the parties have not agreed on the means of conducting the arbitration proceedings then the arbitral tribunal may agree on any means including electronic means provided that this does not create a situation such that one party is unable to access some information.²⁴⁰

The parties to an online arbitration usually would have agreed on conducting the arbitration through electronic means. Most of the ODRSPs clearly state in their procedural rules that the arbitration proceedings would be online.²⁴¹ The question that arises, however, is whether the conduct of the arbitration proceedings by electronic means would in any way render the award invalid or unenforceable.

It was argued that problems could arise with respect to arbitration proceedings conducted by electronic means because there is no identifiable seat of arbitration.²⁴² This view was however disputed by Hill, who argued that the physical place of hearings or other proceedings, or lack of a physical place of hearings or other proceedings, is irrelevant, since the seat of arbitration is either the seat chosen by the parties or the seat chosen by the arbitrators in accordance with the applicable law and arbitration rules.²⁴³ The fact that arbitration is conducted on the Internet and in no particular territorial jurisdiction would therefore not invalidate the arbitration.

²⁴⁰ *ibid.*

²⁴¹ Examples of such providers are; American Arbitration Association, TrustEnforce, Trust Online, Virtual Magistrate

²⁴² Richard Hill, *supra* quoting J. Arsic, n.174

²⁴³ *ibid.*,

There is also no requirement for the arbitrators to meet in person or any restriction against conducting their deliberations by electronic means. The arbitrators may therefore conduct their deliberation by electronic means without invalidating the arbitration.

2.2.4.3 Due process

Another of these procedural principles requires that the parties be granted due process. Basically, due process covers independence and impartiality of neutrals, the right to be treated equally, and the right to be heard in adversary proceedings.²⁴⁴ The right to independence and impartiality does not raise any issues specific to online arbitration other than the issues discussed under choice of arbitrator above and will therefore not be discussed further.

Meanwhile the right to be treated equally requires the arbitrators to impose the same procedural treatment on both parties, which does however not mean identical treatment. It is simply that none of the parties must be put at a substantial disadvantage as a result of the conduct of the proceedings.²⁴⁵

The right to be heard in adversary proceedings covers: the right to a reasonable opportunity to present one's case, the right to a hearing, and the right to rebut the opponent's case.²⁴⁶ The major advantage of ODR is its speed but how fast can an arbitrator go without jeopardizing due process is a question with answers that vary from case to case.

²⁴⁴ Thomas Schultz 'Due Process in Online Arbitration: Public Policy as Speed Bumps in Cyberspace' Text of talk given at Symposium "Putting ICT in Dispute Resolution Practice" Queen Mary, University of London and Chartered Institute of Arbitrators, 6 September 2004, p.3 accessed at <http://www.online-adr.org/TalkQM&CharteredInstitute.pdf> viewed on 20th September 2005

²⁴⁵ *ibid.*

²⁴⁶ G. Kaufmann-Kohler and T. Schultz, *supra*, p.32

The courts have always emphasised the need to comply with the parties' procedural rights, particularly with their right to produce evidence.²⁴⁷ The ODR service provider must therefore provide all the parties sufficient time to present their cases and must ensure that the summary process does not prejudice either party.²⁴⁸

2.2.4.4 Evidence

In arbitration the availability of appropriate communication means implicates even more than the quality of justice.²⁴⁹ If the relevant evidence and arguments cannot be adduced by appropriate means, the process runs the risk of violating due process and may be set aside by court. The ODRSP should therefore ensure that the format and manner used to produce evidence is accessible to all the parties.

Much of the early resistance to ODR probably came from the fact that email is not secure and can be intercepted with the same ease as a postcard.²⁵⁰

Online arbitration primarily if not exclusively employs electronic documents and communication.²⁵¹ In online arbitration like offline arbitration certain facts must be proved before an arbitrator may be able to render a decision. For example facts like: the identity of the parties, their rights and obligations, whether they performed the contract or not. These facts in an online arbitration would have to be proved by transmitting the relevant documents to the arbitrator. As a result information is exchanged electronically between the parties and the neutral to establish facts, put forward arguments, issue directions and convey any other type of communications to reach a decision. But,

²⁴⁷ G. Kaufmann-Kohler and T. Schultz, *supra*, p.32 summarising the holding in the English Formular 1 case of Walkinshaw v. Diniz, High Court-Commercial Court 1999 Folio NO. 522, (2001) 17 Arbitration International 193

²⁴⁸ Paul Gregory Esselaar, University of Cape Town Masters Course, 'The Development of a Practical International Procedure for Online Arbitration', p.55

²⁴⁹ V. Bonnet, K. Boudaoud, and J. Harms, 'Electronic Communication Issues Related to Online Dispute Resolution Systems' p.5, accessed at <http://www2002.org/CDROM/alternate/676/> viewed on 20th June 2005

²⁵⁰ Melissa Conlley Tyler and Di Bretherton, *supra*, para.204-205

²⁵¹ G. Kaufmann-Kohler and T. Schultz, *supra*, p.181

unprotected electronic texts documents, such as emails and word processing texts, pictures, spreadsheets can all be altered, displayed and printed without noticing the alteration. The ODRSPs must ensure that communications are secure. One way of ensuring that messages are not intercepted and altered would be by using cryptography or employing a protected web-based communication.

There is also need to protect data against access by unauthorised persons. Leaving data susceptible to intruders would raise serious issues on privacy and confidentiality of the process.

2.2.5 The Arbitral Award

The arbitration award is made by the arbitrator or arbitral tribunal and contains the decisions reached and the reasons for reaching such decisions.²⁵² Arbitration award is to arbitration proceedings as judgment is to court litigation. It therefore follows that arbitration awards are ‘decisions that finally determine the substantive issues with which they deal’, rendered after proceedings in which the ‘arbitrator’ has authority to adjudicate the dispute.²⁵³ There are some legal issues that relate to the award that will be looked at in this section. Issues like what form should the award take and how and by whom should it be enforced? Is there room for correcting or rectifying mistakes? Can it be reviewed or be set aside? Can it be appealed?

2.2.5.1 Form of the award

Many writers have argued that arbitration awards, whether final or provisional must be written on paper and signed, in ink and by hand, by the arbitrators, at least until laws and courts routinely accept electronic signatures.²⁵⁴

²⁵² Article 37 of the UNCITRAL Arbitration Rules

²⁵³ G. Kaufmann-Kohler and T. Schultz, *supra*, p.217

²⁵⁴ Arsic and Richard Hill, *supra* take this stand

But nothing would stop an arbitration award being notified electronically and signed electronically. It all boils down to whether the laws of the country in which one wishes to enforce an award recognise electronic documents as functionally equivalent to paper documents and whether they recognise electronic signatures.

2.2.5.2 Rectifying /correction of the award

Most ODRSPs make provision for the rectification or correction or amendment of the award before the award becomes enforceable. For example, ICANN's UDRP specifically delays the award of or withdrawal of the domain name for a period of ten business days following the award of the UDRP. This enables the losing party to file court proceedings if they so wish.

Chapter one looked at what ODR is and went on to enumerate its advantages and disadvantages. This chapter has looked at the ODR practice and the legal issues underlying online arbitration. At this point it has therefore been established that online arbitration is legally possible, that is, the parties may electronically agree to arbitrate and that arbitration may be carried out electronically. We have also concluded that online arbitration has many advantages for ecommerce.

If online arbitration is possible and has advantages, has it been applied successfully? Has it been applied to its full potential? If not have there been some failures and what has occasioned these failures or what is limiting its application to its full potential? All these questions will be answered in chapter three.

CHAPTER THREE

SUCCESSSES, OBSTACLES AND FAILURES OF ONLINE ARBITRATION

3.1 THE SUCCESSFUL APPLICATION OF ONLINE ARBITRATION

When dealing with how successful online arbitration has been it will be important to have something to compare it with. What better example than the eBay/SquareTrade dual? As earlier discussed in section 1.4.3.1 above, SquareTrade has the highest case load in ODR and boasts of a 60-80 per cent settlement rate.²⁵⁵ SquareTrade mainly handles online auction disputes arising between eBay clients and their customers. eBay subsidizes the system.

Consumers buying products using the eBay services are offered the opportunity to resolve any disputes between them and the suppliers through SquareTrade, an ODRSP that provides assisted negotiation and mediation services. The consumer commences proceedings by filing an online complaint with SquareTrade which in turn informs the defendant. The parties are then assisted in negotiating a settlement. If the parties fail to settle at this stage they are given the option of having their dispute mediated at a fee.

Further details of how the system works are covered subsequently but it is important to mention at this juncture that SquareTrade was in 2002 awarded by CPR Institute the outstanding achievements award for dispute resolution having settled over two hundred thousand cases with a value of over US Dollars 120.²⁵⁶ The feedback/points system, discussed in chapter four has credit for this success story.

²⁵⁵ G. Kaufmann-Kohler and T. Schultz, *supra*, p.16

3.1.1 Domain Name Disputes

3.1.1.1 ICANN's mandate

Online arbitration is the only means of resolving domain name disputes. Historically, the management of the domain name system was under the control of Network Solutions, a private company operating under a U.S. government-granted monopoly.²⁵⁷ Following the US government's wish to put control of the Internet into private hands in a way that would increase both competition and international participation in the Internet's management, the control of the internet was under a series of memoranda of understanding with the US government vested in the Internet Company for Assigned Names and Numbers (ICANN), a non-profit corporation that has four key functions.²⁵⁸

Within its responsibility to assign domain names ICANN adopted a mandatory arbitration programme to resolve disagreements over domain names. All parties seeking to register a domain name must agree to the organisation's Uniform Domain Name Dispute Resolution Policy (UDRP), which includes a mandatory administrative proceeding administered by its accredited ODRSPs.²⁵⁹

By applying to a registrar to obtain a domain name or by renewing a domain name, the domain name holder, the registrant, "represents[s] and warrant[s]" that, to their

²⁵⁶ R.R.Titus, *supra*, p.72

²⁵⁷ William Krause, 'Do you want to step outside? An overview of online alternative dispute resolution.', John Marshall Journal of Computer and Information Law (19 J. Marshall J. Computer & Info. L. 457), 2001 accessed at <http://international.westlaw.com/search/default> viewed on 24th June 2005

²⁵⁸ The four key functions adapted from John F. Delaney & M. Lorrane Ford, *The Law of the Internet: A Summary of U.S. Internet Caselaw and Legal Developments*, 631PLI/Pat 31,n.167(2001) <http://www.icann.org/general/background.htm> accessed 24th June 2005 were:

- (1) the technical coordination of the domain name system (i.e., www.x.com, which the system converts to numbers, thereby allowing Internet addresses to be assigned easily- remembered names)
- (2) the allocation of Internet addresses,
- (3) the assignment of protocol parameters, and
- (4) the management of the root server system (i.e., the pyramid-like hierarchy of computers).

knowledge, the domain name does not infringe on "the rights of any third party" and is not held for "an unlawful purpose." The registrant also agrees to submit to a mandatory administrative proceeding should a trademark holder file a proper complaint against the registrant under UDRP.

3.1.1.2 How does the system work?

ICANN does not participate in the proceedings. A complaint is filed with any ICANN approved provider when the holder of a trademark believes that someone is infringing upon the trademark by using the name or one confusingly similar to it in a top level domain name.²⁶⁰ ICANN currently has four approved providers worldwide that oversee the arbitration process.²⁶¹ A trademark holder, who has a dispute, may file a complaint with any of these service providers. In addition to handling domain name disputes WIPO has online arbitration of intellectual property disputes.²⁶²

After the complaint is filed, the soon-to-be defendant is contacted via e-mail and given twenty days to respond by filing an answer in hard copy and in electronic form. ICANN rules of procedure do not allow for in-person hearings except in most exceptional circumstances.²⁶³

The arbitrators deliberate and the decision is transmitted to the parties within fourteen days. The whole process occurs online, and all disputes are typically resolved with none of the parties having to travel.²⁶⁴ The arbitral decision is communicated to the parties and then typically posted on a publicly accessible Web site, unless otherwise stated by the arbitral panel.²⁶⁵

The disputants have a choice between having their case heard by a single arbitrator or a panel of three. The costs of the proceedings are borne by the complainant unless the

²⁵⁹ Lucille M. Ponte, *supra*

²⁶⁰ Karen Stewart, *supra*, para. 1125

²⁶¹ *ibid.*

²⁶² www.wipo.int/index

²⁶³ *ibid.*

²⁶⁴ Karen Stewart, *supra*, para. 1125

²⁶⁵ William Krause, *supra*,

registrant elects to use a three-arbitrator panel, in which case the fees are split. Fees are set by the approved providers and vary from provider to provider.²⁶⁶

3.1.1.3 What remedies are available under UDRP?

The only remedies available under UDRP are cancellation of the domain name or transfer of the domain name to the complainant.²⁶⁷ Once the arbitrator rules on a case, ICANN will, if called for by the decision, cancel or transfer a disputed domain name, unless the holder files a court action within ten days of the decision.

However, UDRP is only an optional remedy; the disputant can instead bring a suit in any competent court, and although the registrant is compelled to arbitrate, the registrant may fight any unfavorable decision in court.²⁶⁸

3.1.1.4 Why is ICANN's UDRP successful?

ICANN's UDRP programme has been successful because of ICANN's advantage of being able to enforce the arbitral award by canceling or transferring domain name registrations.

Although the UDRP does not produce decisions that are binding and enforceable by operation of law, it produces decisions that are binding and enforceable through technology- the decision is enforceable by the registrar, who is contractually bound to do so under the ICANN rules.²⁶⁹ The registrar is contractually bound to act so because the clause that establishes the jurisdiction of the UDRP providers is imposed on all registrars and registrants of the genTLDs like 'com', 'org', and 'net'. The UDRP is not only employed to resolve genTLDs but has also been adapted and is successfully

²⁶⁶ Refer to annex B

²⁶⁷ Lucille Ponte, *supra*,

²⁶⁸ *ibid.*.

²⁶⁹ G. Kaufmann-Kohler and T. Schultz, *supra*, p.39

operational at country code level to solve disputes involving ccTLDs like ‘ug’, ‘za’, ‘sg’, and ‘uk’.

In addition to this under the ICANN dispute resolution policy, parties are not prevented from bringing a legal action in a court of competent jurisdiction.

Further more the fact that the subject of domain names is publicity-sensitive plays a role as well.²⁷⁰ The UDRP has however been criticized for being biased in favor of trademark holders in majority of the cases.²⁷¹

3.2 OBSTACLES

Resolving a dispute through online binding arbitration faces a number of obstacles. These obstacles arise throughout the process: first the agreement to arbitrate, second the arbitration procedure, and finally the recognition and enforcement of the arbitral award. The process also faces obstacles that are outside the process like: the lack of consumer confidence in the process and consumer protection laws, lack of an ODR culture and limited connectivity. The agreement to arbitrate and the arbitration procedure were discussed under legal issues facing online arbitration. This section will therefore concentrate on the recognition and enforcement of the arbitral award. Enforcement of the award can however not be divorced from the agreement to arbitrate and the arbitration procedure as both affect enforcement therefore there will be need to continually refer to the earlier discussion of these issues.

²⁷⁰ *ibid.*

²⁷¹ *ibid.*, where reference is made to ‘A statistical analysis of the UDRP by M. Geist who concluded that when providers control who decides a case, as they do for all single panels cases, complainants win just over 83% of the time. As providers influence over panellists diminishes, as occurs in three-member panel cases, the complainant winning percentage drops to 60%’

3.2.1 Enforcement of the award

For the arbitration process to be effective the award must be enforceable. Without effecting enforcement, the validity of ODR may be severely hindered.²⁷² One would think that since parties opt for arbitration voluntarily they would also implement the outcome voluntarily, but this is usually not the case. A winning party is usually faced with the hurdle of enforcing the award. Enforcement of the arbitral award is a big stumbling block more so if it involves parties within different geographical locations. This section will give special emphasis on the enforcement of foreign awards because they face more difficulties than domestic awards.

Save for within Europe where foreign judgments are enforced on the basis of the Brussels I Regulation²⁷³ or the Lugano Convention²⁷⁴ of all outcomes of a dispute resolution process, arbitral awards are the most easily enforced abroad.²⁷⁵ It may seem odd that awards the result of a voluntary agreed process pronounced by persons having no official judicial standing should be more readily enforced around the world than judgements.²⁷⁶ Indeed the regime for the enforcement of foreign arbitral awards is a substantial plus in favour of arbitration when one is faced by the choice of arbitrating or litigating.²⁷⁷

An arbitral award between parties within the same country and sought to be enforced within that country would be enforced in accordance with the arbitration laws of that country. All the issues relating to formal and substantive validity would be determined

²⁷² American Bar Association Task Force on Ecommerce and Alternative Dispute Resolution, Draft Preliminary Report and Concept Paper 45 (May 2001) may be accessed at <http://www.washington.edu/ABA-eADR> viewed on 24th June 2005

²⁷³ Regulation No.44/2001 of 22nd December 2000 on jurisdiction and recognition and enforcement of judgements in civil and commercial matters.

²⁷⁴ Lugano Convention on Jurisdiction and Enforcement of Judgments in Civil and Commercial matters of 1998

²⁷⁵ G. Kaufmann-Kohler and T. Schultz, *supra*, p.216

²⁷⁶ W.M. Reiseman W.L. Craig, W. Park, and J. Paulson, *International Commercial Arbitration: Cases and materials and notes on the Resolution of International Business Disputes* (Foundation Press- University Casebook, Westbury, NY, 1997), P.1215

²⁷⁷ R.B von Mehren, 'Enforcement of Foreign Arbitral Awards in the United States' [1998] Int. A L R 198, PP.198-199 quoting W.M. Reiseman W.L. Craig, W. Park, and J. Paulson, n.158

in accordance with that country's laws. However, an award sought to be enforced in a country other than the one in which it was issued would be enforced in accordance with the laws on enforcement of foreign awards operational in that country. The issues relating to formal and substantive validity may not necessarily be determined in accordance to the laws of the country in which enforcement is sought.

Online arbitral awards may be enforced in court either in the form of a printed version, hand-signed by the arbitrators, and notified to the parties on paper, or in the form of an electronic document, signed using electronic signatures, and notified to the parties electronically.²⁷⁸ Enforcement using the first option would not raise any issues specific to ODR as the award would be signed and notified as an offline award. Enforcement by these means may however water down the advantage of speed of ODR processes as this can only be possible through offline means which are slower than the online environment. When seeking enforcement of the award under the New York Convention (NYC), the electronic form of the award in the second option would give rise to questions on: the concept of the award, validity of an arbitration agreement entered on line, binding and notification of the award and certification and authentication of the award.

The NYC does not define the notion of award but from the definition of an arbitral award given under section 2.3 above it is clear that the form of the award is not a constituent of its nature.²⁷⁹ It therefore follows that an award may not be refused under the NYC on the ground that the decision was not rendered in paper form and signed by the arbitrators.²⁸⁰

²⁷⁸ G. Kaufmann-Kohler and T. Schultz, *supra*, p.216

²⁷⁹ *ibid.*, p.217

²⁸⁰ *ibid.*, quoting E. Gaillard and J. Savage, n.207 above who in para.1389 stated that 'it has been considered unnecessary to specifically require an award in writing in international arbitration. Oral awards are thus not precluded, but remain extremely rare, which is fortunate given the evidential difficulties which they are liable to create at the enforcement stage'.

The question of validity of an arbitration agreement entered on line was discussed under section 2.1 above. It is however important to note the provisions of Article V(1)(a) of the NYC on the requirements of substantive validity that are governed by ‘the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made’. In practice, the courts virtually always found that the law of the country where the award was made governs the arbitration agreement.²⁸¹ It therefore follows that questions on consent to arbitrate and arbitrability have been ruled by courts as governed by the law of the country where the award was made.

The NYC does not require notification of the award, but Article V(1)(e) of the NYC provides that enforcement of an award may be refused if the award has not become binding. It is, however, not clear whether the term ‘binding’ refers to the national law applicable to the award or whether it is subject to autonomous interpretation under the Convention.²⁸² As a result, different countries have decided the term ‘binding’ basing on different laws. For example Belgian, Dutch, German, Italian, and Swedish courts follow the autonomous interpretation solution while French courts investigate the applicable law.²⁸³ Some courts may find that the autonomous concept of a binding award requires notification while similarly some applicable national laws require notification of the award for it to become binding. For example, Article 190(1) of the Swiss PIL Act provides that ‘the award shall be final when communicated’.

In both instances there exists a difficulty because the currently applied email protocols do not allow for the non-repudiation of emails.²⁸⁴ It is therefore difficult to prove the notification of an email except if specific protocols and email programmes are used.²⁸⁵

²⁸¹ G. Kaufmann-Kohler and T. Schultz, *supra*, p.218 quoting A.J. van den Berg, ‘New York Convention of 1958: Consolidated Commentary. Cases Reported in Volumes XXII (1997)-XXVII(2002)’ (2003) Yearbook Comm. Arb’n 566, para. 506

²⁸² *ibid.* 218

²⁸³ G. Kaufmann-Kohler and T. Schultz, *supra*, p.218 in note 804 quoting A.J. van den Berg n.163 above

²⁸⁴ *ibid.* p.219

²⁸⁵ *ibid.*

It is suggested that the problem could be overcome by employing one of three alternatives. First, the arbitrators could in addition to an electronic copy send a paper copy. Alternatively the rules of procedure could provide that a specific email programme allowing non-repudiation must be downloaded and installed on the parties' computers and used for all communication with the arbitral tribunal.²⁸⁶ Thirdly the award could be viewed on a password protected website which would be capable of recording access by the parties. Under this option the arbitrators could invite the parties by email to log on to the website for an update of their case.²⁸⁷

Another issue facing enforcement of online awards under the NYC is the requirement for the party applying for enforcement to produce authenticated originals of the award or certified copies thereof and an original agreement to arbitrate.²⁸⁸ There seems to be no practical way of producing an original electronic document, as this would be the data stored on the hard disc on which the document was originally recorded. Making the Convention on the use of Electronic Communications in International contracts²⁸⁹ applicable to the NYC may solve all these problems.²⁹⁰

²⁸⁶ *ibid.* p.219

²⁸⁷ ECODIR and OnlineConfidence communicate their recommendations using this method.

<http://www.ecodir.org>

²⁸⁸ Article IV, paragraph 1 of the NYC

²⁸⁹ n.129

²⁹⁰ Art. 4 of the Convention on the use of Electronic Communications in International contracts, provides that: Where the law requires that a contract or any other communication should be presented or retained in its original form...that requirement is met in relation to an electronic communication if (a) [t]here exists a reliable assurance as to the integrity of the information it contains from the time when it was first generated in its final form, as an electronic communication or otherwise; and (b) [w]here it is required that the information it contains be presented, that information is capable of being displayed to the person whom it is to be presented;

and

Art. 1(a) of the same Convention provides that: Where the requires that a contract or any other communication should be signed by a party ... that requirement id met in relation to an electronic document if (a) [a] method is used to identify the party and to indicate that party's approval of the information contained in the electronic communication; and (b) that method is reliable as appropriate to the

Alternatively the NYC requires that certified copies could be produced. The arbitrators could digitally sign the arbitration agreement and award thus certifying their authenticity and originality.²⁹¹ Since the NYC is silent on the law applicable to certification the enforcement court may apply the law of the country in which the award was made or the law of the country in which it is sought to be enforced.²⁹² Acceptance of this option would therefore depend on whether the law that the court chooses to apply recognises digital signatures. This would however still leave the question of which body would have the authority to certify. Applying the Convention on Electronic Communications in International Contracts to the NYC would however eliminate the issues of certification.

In addition to the foregoing use of online arbitration in cross border B2C disputes is faced with the obstacle of commercial reservation under the NYC where member countries are allowed to refuse to enforce an arbitral award in a dispute that it considers not to be commercial. The NYC was drafted for the purpose of enforcing arbitration agreements in commercial disputes, generally defined as disputes between two businesses.²⁹³ One of the central purposes of the commercial reservation was to prevent the mandatory enforcement of pre-dispute arbitration clauses when one of the parties is a consumer.²⁹⁴ The commercial reservation, in an attempt to protect consumers, removes consumers' power to bind them, at least prior to the dispute, to resolve it by means of arbitration.²⁹⁵ Although the commercial reservation has generally been given broad interpretation, it has received the narrowest and strictest international interpretation in

purpose for which the electronic communication was generated or communicated, in the light of all the circumstances, including any relevant agreement.

²⁹¹ G. Kaufmann-Kohler and T. Schultz, *supra*, p.221

²⁹² *ibid.*

²⁹³ Karen Stewart and Joseph Mathews, *supra*, para.1135

²⁹⁴ *ibid.* para.1135

²⁹⁵ *ibid.* para.1136

support of the general international antipathy towards the arbitration of B2C disputes.²⁹⁶
The consensus has been that online B2C transactions disputes are not commercial.²⁹⁷

Article V of the NYC also allows the courts of a country in which an award is sought to be enforced to refuse such enforcement if the award violates the public policy of any involved country.

The Organisation for Economic Co-operation and Development (OECD), an international organization that assists governments in meeting the social, economic and governmental challenges of globalisation, has been greatly involved with ODR. In December of 2000, OECD organised a conference on 'Building Trust in the Online environment: Business-to-Consumer Dispute Resolution' that focused on the out of court resolution of small value B2C disputes.²⁹⁸ Following this conference, OECD developed a work programme for B2C ADR and ODR aimed at providing a survey of the obstacles of the existing national laws. OECD sent out questionnaires to the member states on the existing legal provisions related to B2C ADR and ODR.²⁹⁹ OECD made a report that showed that Member States recognize the benefits of ODR and largely encouraged it, but have not developed specific legal regimes; that governments often establish, fund and run offline ADR schemes; and that there are many national differences as to the validity of ADR agreements, the applicable procedural principles, confidentiality, and enforceability of settlement agreements.³⁰⁰ The OECD thus identified national differences in existing legal frameworks on ADR as the main obstacle to ODR.³⁰¹

²⁹⁶ *ibid.* para.1136

²⁹⁷ *ibid.*

²⁹⁸ See OECD, Committee on Consumer Policy, 'Building Trust in the Online Environment: Business to Consumer Dispute Resolution. Joint Conference of OECD, HCOPIL, ICC. Report of the Conference', DSTI/ICCP/REG/CP(2001)2 [www.oilis.oecd.org/oilis/2001doc.nsf/LinkTo/DSTI-ICCP-REG-CP\(2001\)2](http://www.oilis.oecd.org/oilis/2001doc.nsf/LinkTo/DSTI-ICCP-REG-CP(2001)2) The Hague, 19th April 2001

²⁹⁹ See OECD, Committee on Consumer Policy, 'Resolving E-Commerce Disputes Online: Asking the Right Questions About ADR', DSTI/ICCP/REG/CP (2002)2/Final, 4th June 2002.

³⁰⁰ G. Kaufmann-Kohler and T. Schultz, *supra*, p.85 in note 312 where it is stated that this questionnaire was published as an annex to OECD, Committee on Consumer Policy, 'Legal Provisions Related to Business-to-Consumer Alternative Dispute Resolution in Relation to Privacy and Consumer Protection', DSTI/ICCP/REG/CP(2001)1 < [www.oilis.oecd.org/oilis/2002doc.nsf/linkto/dsti-iccp-reg-cp\(2002\)1-final](http://www.oilis.oecd.org/oilis/2002doc.nsf/linkto/dsti-iccp-reg-cp(2002)1-final) > , 17th July 2001 p.17 *et seq*

³⁰¹ G. Kaufmann-Kohler and T. Schultz, *supra*, p.85

3.2.2 Lack of consumer confidence

Consumers have not yet gained confidence in ecommerce. In most instances everything related to ecommerce is viewed with suspicions. Consumers are afraid of being cheated and ripped off. The fact that there is no clear authority over the internet makes it very hard for the consumers to gain confidence in ecommerce.

Online sellers are also concerned with the lack of a uniform, fair, effective, and predictable legal system governing online commerce and face enormous difficulties and inconsistencies when engaging in transactions directly with consumers, especially those located in different countries.³⁰² For example the different ODRSP have differing rules and standards. The providers have got no umbrella body to check that certain basic standards are followed. As a result consumers are afraid that the providers will always make decisions in their favour thus compromising the consumers.

3.2.2 Limited Connectivity

Important to mention at this point is the fact that in many parts of the world internet connections are expensive and may only be afforded by the rich. ODR would require constant internet connection unlike making purchases online that may be easily accomplished by a short visit to an internet café.

In addition to this most of the programmes operate with high speed internet connections which are very expensive to an ordinary consumer but could be easier to achieve by a business. Further to this is the issues of technical barriers, some of the ODRSPs employ high technology which would make it impossible for people with low technology to keep up the pace.

3.3 FAILURES

Online arbitration has not registered as much success as would have been expected of a system with so many advantages. All the ODRSPs studied, with the exceptions of the UDRP approved providers don't seem to have registered a lot of success in online arbitration. In fact what seems to be common is that the providers use online resources to file disputes and submissions, and general communication but fall back to offline arbitration to complete the process. AAA confesses that although their clients use online resources in filing submission and making payments they prefer to hold offline hearings.³⁰³

Meanwhile CIA handled about 200 arbitration disputes entirely online compared with about 5,000 documents-only arbitration procedures that were not handled entirely online within the same time frame.³⁰⁴

It is understandable for international disputes that have troubles with enforcement of the outcomes but what about national disputes? Could it be that the people have not yet developed an ODR culture and that when this develops there will be better results?

³⁰² *ibid.* para.1114

³⁰³ When asked whether AAA had solved any of the disputes entirely online, Debbi Moore went on to say that the possibility to handle cases entirely online does exist, however, parties preferred to file their submissions, make payments, and select their arbitrators online but then preferred to have offline hearings. Look at the full interview in G. Kaufmann-Kohler and T. Schultz, *supra*, p.294

³⁰⁴ Look at the full interview in G. Kaufmann-Kohler and T. Schultz, *supra*, p.297

CHAPTER FOUR

THE DEVELOPMENT OF AN EFFECTIVE AND ENFORCEABLE ONLINE ARBITRATION SYSTEM FOR DISPUTE RESOLUTION

4.1 BACKGROUND

There is a lack of legal framework for international ecommerce. Online consumer transactions are currently governed by a patchwork of national laws, including domestic consumer protection laws of individual nations.³⁰⁵ This non-uniform legal system makes it difficult for both consumers and businesses desiring to engage in online international B2C commerce to predict which law will govern their relationship.³⁰⁶ This has resulted in a majority of consumers not being able to get judicial redress for most of the disputes that may arise when they transact online.

4.2 LEGISLATION

With the rapid growth of business on the internet it became apparent that there was need to regulate its activities. There has also been a growing international awareness by sovereigns of the need for the development of a predictable dispute resolution system to govern online transactions.³⁰⁷ Countries have attempted to address the situation by either enacting legislation to specifically govern ecommerce or by applying existing national laws to ecommerce and by negotiating treaties with their respective trading partners.

4.2.1 National legislations on online transactions

³⁰⁵ *ibid.* para 1136

³⁰⁶ *ibid.*

³⁰⁷ *ibid.* para.1136

Sovereigns have made attempts to enact laws governing online commerce. For instance the European Union (EU) has besides general legislations on electronic transaction passed laws designed to protect online consumers. For example in 1997 the EU enacted the Distance Buying Directive (the 'Directive').³⁰⁸ The Directive enables online consumers to cancel any contract between parties at a distance within seven days after entering into the contract.³⁰⁹ The Directive requires online businesses to prominently post a notice of this right on all areas of the web site where consumers can finalize transactions.³¹⁰ The South African ECT Act has similar provisions. However most of the web-sites visited by consumers in the EU or South Africa are based in the United States where the EU or South Africa have little if any power to enforce their laws.³¹¹

4.2.2 Application of National Laws to Ecommerce

Besides enacting laws specifically to regulate online transactions, countries have also attempted to apply their domestic laws to ecommerce.³¹² A good example of this is the EU which adopted a country of destination approach which makes the law of the consumer's domicile applicable as the law governing online B2C transactions. Applying the country of destination policy to online transactions raises many problems because items available for sale online are available in many countries at the same time. Any business that wants to engage in ecommerce would have the impossible task of ensuring that its website conformed to the laws of all nations where consumers have access to the product.³¹³ Moreover, because the laws of different countries are often in conflict, obeying the laws of one nation can sometimes only be done at the risk of prosecution under the laws of another.³¹⁴

³⁰⁸ European Parliament Document 97/7/EC, Council of 20th May 1997: Protection of Consumers in Respect to Distance Contracts.

³⁰⁹ *ibid.*

³¹⁰ *ibid.*

³¹¹ Karen Stewart and Joseph Mathews, *supra*, para.1115

³¹² Ryan Morlatt, 'The Cyberspace Showdown Jurisdictional Jurisprudence: The United States Versus the European Union', 9 Summer Currents: Int'l Trade L.J. 89, 95-6 (2000).

³¹³ See Jennifer Schenker, 'Europe Ponders Ways to safeguard Online Customers', Wall St. J., October 19, 1998, at A15

³¹⁴ Karen Stewart and Joseph Mathews, *supra*, para.1116

One of the leading cases demonstrating this is *Yahoo! Inc. Vs. La Ligue Contre le Racisme et l'Antisemitisme ("LICRA")*.³¹⁵ The case involved Yahoo! Inc., an Internet provider, with headquarters in the United States, that was sent a cease and desist order from LICRA, a French not-for-profit organisation. LICRA wanted Yahoo! to stop allowing end users to post Nazi memorabilia on its online auction site, which was a violation of French law. A French Court entered an order directing Yahoo! to remove the material from its sites and threatened a penalty of USD 13,300 per day for noncompliance. Yahoo! refused, claiming that such a ban violated the right to free speech guaranteed by the U.S. Constitution. Yahoo! then sought a declaratory judgment in the U.S. District Court in California declaring the French order unenforceable. The District Court granted the declaratory judgment, reasoning that even though France has the sovereign right to pass laws for the benefit of its citizenry, a U.S. court could not enforce a foreign order that violated the U.S. Constitution by chilling protected speech that occurs simultaneously within U.S. borders. Additionally, the court held that absent a body of law that establishes international standards with respect to speech on the Internet and an appropriate treaty or legislation addressing enforcement of such standards to speech originating within the United States, the Court was obligated to uphold the U.S. Constitution.

It follows that when businesses are forced to comply with the law of every nation in which a possible consumer may be located, those businesses simply include a disclaimer on their web site that their goods or services are not available outside their country.³¹⁶ This is certainly not in the interest of the consumers. Where laws of the consumer's nation and the business' nation conflict, and where there is difficulty enforcing laws designed to protect consumers, there will continue to be a lack of predictability in determining which law will govern the transaction and other businesses will be left in the

³¹⁵Reported in 169 F.Supp. 2d 1181, 1192(N.D.Ca.2001). The facts of the Yahoo in this work have been reproduced from the work of Donna M. Bates, 'A Consumer's Dream or Pandora's Box: Is Arbitration a Viable Option for Cross-Border Consumer Disputes?', 27 Fordham Int'l L.J. 823 accessed at

³¹⁶ Kate Scribbins, 'Should I buy? Shopping Online 2001: An International Comparative Study of Electronic Commerce' (2001) where it was explained tat many web sites simply choose not to do business with consumers located outside of their country.available at <http://www.consumersinternational.org.CIShouldibuy.pdf> viewed on 20th November 2004

quandary Yahoo! faced.³¹⁷ Rather than increasing the predictability of determining which law will apply, the EU's policy governing electronic commerce instead created a rift between the two nations with the largest financial investment in online B2C commerce.³¹⁸

4.2.3 Negotiating treaties

Seen above are conflicting views between the European countries and the United States on how international consumer disputes should be resolved. These conflicting views are also the reason for the current stalemate in attempts to draft a treaty that would decide which country has jurisdiction over electronic disputes between businesses and consumers.³¹⁹ On 19th October, 1996, the Eighteenth Session of the Hague Conference on Private International Law (the 18th Session) agreed to include on the agenda for the next session the question of 'jurisdiction, and recognition and enforcement of foreign judgments in civil and commercial matters' and established a Special Commission to handle the task. On October 30, 1999, the Special Commission adopted the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (the "Convention").³²⁰

Under the Convention³²¹ there is a major contention as to the wording of provisions in Article 7, on where an aggrieved consumer may file disputes.³²²

³¹⁷ Karen Stewart and Joseph Mathews, *supra*, para.1116

³¹⁸ *ibid.* para.1118

³¹⁹ Paul Hofheinz, 'Birth Pangs for Web Treaty Seem Endless', *Wall St. J.*, Aug. 16, 2001, at A11.

³²⁰ Hague Conference on Private International Law, Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters (Oct. 30, 1999), available at <http://www.hcch.net/e/conventions/draft36e.htm> viewed on 24 June 2005

³²¹ Hague Conference on Private International Law, Summary of the Outcome & the Discussion on Commission II of the First Part of the Diplomatic Conference 6-20 June 2001, Nineteenth Session, 7(2001)

³²² Art.7 in paragraph 2 provides that: "subject to the provision of paragraphs [5-7] a consumer may bring [proceedings--an action in contract] in the courts of the State in which it is habitually resident, if: the claim relates to a contract which arises out of activities, including promotion or negotiation of contracts, which the other party concluded in that State, or directed to that State, [unless that party establishes that:] (a) the

There are three alternative versions of paragraphs 5-7 under review.³²³ Alternative one would make paragraph 2 a default rule in which the parties could contractually select the forum in which the dispute would be resolved.³²⁴ The second alternative would allow contracting states to take a type of reservation that would allow it to respect a jurisdiction agreement if it is entered into after the dispute arises.³²⁵ Meanwhile the third alternative would simply include in the mandatory text of the Convention the statement that paragraph 2 applies unless the jurisdiction agreement was entered into after the dispute arose.³²⁶

To date agreement on any of these alternatives by both the United States and the EU has failed. Preventing agreement on a final version is the fact that the Convention adopted heavily from the Brussels Convention, which is based upon the European view of how disputes should be settled.³²⁷ During the revisions of the Brussels Convention, the European Parliament was emphatic that there would be no change in the rules of consumer protection, in which there is a policy in favour of customers having the ability to sue in courts of their habitual residence.³²⁸ This European policy would eliminate alternative one and delegates representing the interests of the United States are unwilling to accept either alternatives two or three, arguing that provisions allowing online businesses to be sued wherever particular consumers are located would cripple the fledgling e-commerce sector.³²⁹ Consequently, this Convention may turn out to be

conclusion of the contract on which the claim is based is related to trade or professional activities that the defendant has engaged in or directed to that State, in particular in soliciting business through means of publicity; [and (b) the consumer has taken the steps necessary for the conclusion of the contract in that State.]

³²³ Karen Stewart and Joseph Mathews, *supra*, para.1119

³²⁴ *ibid.* quoting the summary of the outcomes and discussion of the 19th session

³²⁵ *ibid.*

³²⁶ *ibid.*

³²⁷ *Ibid.* para.1120 quoting Christopher Kuner, 'Legal Obstacles to ADR in European Business-to-Consumer Electronic Commerce' (Apr. 2000), at <http://ilpf.org>.

³²⁸ *Ibid.*

³²⁹ *Ibid.*

merely an academic exercise rather than a means of determining the law governing the future cross-border B2C disputes.³³⁰

4.3 REGULATION OF ODR

4.3.1 Background

We have seen that the major stakeholders in ODR are governments, consumer organisations, business organisations, and institutions of dispute resolution. Much as they all have a common interest in the new opportunities offered through providing online dispute resolution, their views concerning its use and promotion are not always uniform.³³¹ Though all are in favour of ODR, there is no unison as to the sought format: their recommendations vary. They all look at ODR at different angles: their opinions of ADR and ODR are sculptured in line with their interests. Governments are for ODR because it provides access to justice in a unique form that courts are not able to provide, reduces case loads in courts and furthers e-commerce which in turn boosts their economies. Businesses on the other hand are in favour of ODR because it provides a fast cheaper way of resolving dispute that is private which creates consumer trust and as a result translates into higher revenues. The consumer organisations look at ODR as a means of enforcing consumer rights. Meanwhile dispute Resolution Institutions view ODR as an opportunity to widen and improve their service provision

4.3.2 Attempts by Governments

Most governmental activities remain on the level of the abstract definition of general principles because most governments have not made the decision upon the appropriate

³³⁰ *ibid.* quoting Arthur. T. Von Mehren, 'Drafting a Convention on International Jurisdiction and the Effects of Foreign Judgment Acceptable World-Wide: Can the Hague Conference Project Succeed?' 49 Am. J. Comp. L. 191, 192-93(2001)

³³¹ G. Kaufmann-Kohler and T. Schultz, *supra*, p.83

extent of their intervention; whether; ODR should be regulated co-regulated, or self regulated.³³²

Different governments have been represented at different forums to discuss issues related to ODR. At the Hague Conference of 2000 ODR was discussed among other things. The conference gave an account of the convergences and divergences of the participants.³³³ Among the convergences, it shows that the participating governments, industry and consumers groups have agreed on the importance of: accessibility; low cost to consumers; transparency; speed; procedures to take into account cultural and language differences; impartiality and the qualification of dispute resolution officers to ADR and ODR.³³⁴ The participants however had divergent views on the mandatory recourse to ADR or ODR and binding outcomes.³³⁵

4.3.2.1 The European Union

The EU has been active in the field of developing extra-judicial dispute resolution and has had many initiatives to this effect.³³⁶ In addition to promoting ODR through adequate regulation, the EU has been active in boosting its development. The EU has for instance financially supported ECODIR, an ODRSP in its trustmark projects for commercial sites and research projects.

³³² *ibid.*

³³³ G. Kaufmann-Kohler and T. Schultz, *supra*, p.84. The conference materials are available at www.oecd.org/document/22/0,2340,en_2649_34267_1864982_1_1_-1,00.html

³³⁴ *ibid.*

³³⁵ The report on pp.3-4

³³⁶ These initiatives include; the Green Paper on consumers' access to justice 1993, the EU Parliament's Resolution encouraging recourse to arbitration to settle legal disputes in 1994, The EC's Recommendation on the principles applicable to extra-judicial consumer dispute resolution in 1998, the Directive on ecommerce of 2000, the Commission's Recommendation on the principles for out of court bodies involved in the consensual resolution of consumer disputes 2001 and the Commission's Green Paper on ADR in civil and commercial law on 2002

The EU in its second Recommendations, of 2001 which are variants of principles in the first Recommendations favours the principles of: impartiality³³⁷; transparency³³⁸; effectiveness³³⁹; and fairness.³⁴⁰

4.3.2.2 The USA

Whereas the EU has taken steps to regulate ADR and extended these initiatives to ODR, in the USA the promotion of ODR is considered to be better served by self-regulation than government intervention.³⁴¹ The stakeholders in the US are disagreed on the role that the government should play.³⁴²

The participants had a consensus that the principles of: impartiality; no or low cost to the consumer; accessibility; transparency; and speed should be implemented by ODRSPs.³⁴³ The matters of mandatory character of B2C ODR and binding character of the dispute resolution outcomes were however controversial.³⁴⁴

4.3.2.3 Australia

In Australia the National Alternative Dispute Resolution Advisory Council (NADRAC) is the policy making body as far as ODR is concerned. NADRAC only releases non-binding policy statements that may be or may not be adopted by the federal and state governments and the private sector.³⁴⁵ NADRAC has made some best practice

³³⁷ Art. II(A), 'the neutral [m]ust have no conflict of interest and must provide information about their impartiality and competence to the parties prior to the procedure...'

³³⁸ Art. II(B)

³³⁹ Art. II(C)

³⁴⁰ Art. II(D)

³⁴¹ G. Kaufmann-Kohler and T. Schultz, *supra*, p.91

³⁴² The Federal Trade Commission and Department of Commerce conference organised a conference on B2C ODR in June 2000 at which some participants were for government taking a lead while others against government intervention. The report of the Conference is available at www.ftc.gov/bcp/altdisresolution/summary.htm November 2000, viewed on 20th June 2005

³⁴³ *ibid.*

³⁴⁴ *ibid.*

³⁴⁵ G. Kaufmann-Kohler and T. Schultz, *supra*, p.94

recommendations.³⁴⁶ The recommendations seek to find solutions to the problems earlier identified by NADRAC in the Background Paper.³⁴⁷ NADRAC's recommendations rely on the principle of functional equivalence: the same standards of protection should apply, whether the proceedings take place online or offline.³⁴⁸ The recommendations make the regulatory principles of: accessibility despite limited bandwidth; privacy in accordance with Australian privacy laws; security; quality; fairness and neutrality.³⁴⁹

4.3.3 Attempts by Business organisations

Business organisations too have a stake in ODR and have made commendable efforts to see to its smooth running. For example the Alliance for Global business (AGB), a network of five organisations relating to ecommerce: the ICC, the International Telecommunication Users Group (INTUG), the Business and Industry Advisory Committee to the OECD (BIACA), the World Information Technology and Services Alliance (WITSA), and the Global Information Infrastructure Commission (GIIC), advocate for self-regulation and have also made some recommendations for ODR procedures.³⁵⁰ The AGB according to its Global Action Plan for Electronic Commerce³⁵¹ seeks to promote ecommerce by increasing trust among the actors.³⁵² To achieve this goal the AGB is of the view that ecommerce should largely be self-regulated with governments merely providing a stable predictable environment by ensuring the

³⁴⁶ See NADRAC, 'Dispute Resolution and Information Technology: Principles of Good Practice', www.nadrac.gov.au/adr/DisputeResolutionInformationTechnology.htm, March 2002 viewed on 29th June 2005

³⁴⁷ See National Alternative Dispute Resolution Advisory Council (NADRAC), 'Online ADR: Background Paper', <www.nadrac.gov.au/Publications>, January 2001

³⁴⁸ G. Kaufmann-Kohler and T. Schultz, *supra*, p.95

³⁴⁹ See NADRAC, 'Dispute Resolution and Information Technology: Principles of Good Practice', www.nadrac.gov.au/adr/DisputeResolutionInformationTechnology.htm, March 2002 viewed on 29th June 2005

³⁵⁰ G. Kaufmann-Kohler and T. Schultz, *supra*, p.97

³⁵¹ See Alliance for Global Business, 'A Global Action Plan for Electronic Commerce', 3rd edn www.iccwbo.org/home/e_business/word_documents/3rd%20Edition%20Plan.pdf, July 2002

³⁵² G. Kaufmann-Kohler and T. Schultz, *supra*, p.97

enforceability of contracts as well as the protection of intellectual property rights and of free competition.³⁵³

The Global Business Dialogue on electronic commerce (GBDe), a worldwide business initiative for the development of a global policy framework to promote the online economy, is another business organisation that is promoting ODR.³⁵⁴ In November 2003, GBDe reached an agreement with Consumers International; this agreement, the first one between major representatives of businesses and consumers, set forth the following recommendations:³⁵⁵

“...Internet merchant are recommended to:

- Encourage the use of in-house dispute handling programmes as a first and preferred remedy.
- Draw the customers’ attention to the possibility of recourse to ADR
- Inform consumers about the conditions of ADR
- Use unilaterally binding ADR clauses, i.e. accept referral o ADR but offer it to the customer as a voluntary option, not a contractual obligation.

ADR and ODR service providers are recommended to:

- Ensure impartiality
- Ensure that ADR officers are sufficiently qualified
- Ensure that their systems are easily accessible, convenient, speedy and inexpensive to consumers
- Show transparency to ensure credibility and acceptance of ADR systems generally. More precisely, providers should provide a clear description of the procedure, issue annual reports containing aggregated and anonymized case information, and publish arbitral awards indicating the identity of the web trader
- Permit the parties to be assisted by legal counsel
- Base their decision on ‘equity’ or on codes of conduct

³⁵³ *ibid.*

³⁵⁴ *ibid.*p.98

³⁵⁵ The recommendations were reproduced in G. Kaufmann-Kohler and T. Schultz, *supra*, p.98. They are also available at: Global Business Dialogue on electronic commerce and Consumers International, ‘Alternative Dispute Resolution Guidelines. Agreement reached between Consumers International and the Global Business Dialogue on Electronic Commerce’ www.gbde.org/adragreement03.pdf November 2003

- Exclusively base binding arbitration on agreements entered into after the dispute arose

Governments are recommended to:

- Resolve questions of jurisdiction and applicable law in ecommerce
- Actively promote public awareness of ADR systems and their role in resolving B2C commercial disputes
- Encourage the use of in-house procedures and ADR
- Educate and train ADR personnel
- Refrain from adopting government accreditation systems without careful consideration and balancing of interests. Even government rating systems or assessment rules should only be developed in cooperation with a wide variety of stakeholders, particularly consumer groups and business
- Allow ADR systems to function on the basis of equity or codes of conduct. In addition, third neutrals should not be required to have formal qualifications
- Collaborate with other governments and organisations
- Allow the use of modern technologies
- Keep procedural and formal requirements to a minimum
- Enforce the foreign principles: actions should be taken against those ADR providers who do not comply with the adopted principles...”

4.3.4 Attempts by Consumer Organisations

Consumer organisations are in favour of ODR. They would like an online consumer to receive the same protection as the offline counterpart. Consumer organisations advocate for an ODR system that is quick, free or low cost to the consumer and not a mandatory precondition to court proceedings. They are generally opposed to ODR procedures that exclude the consumer’s right to institute court proceedings.³⁵⁶ The organisations

³⁵⁶ Consumers International, ‘Disputes in cyberspace 2001. Update of Online Dispute Resolution for Consumers in Cross Border Disputes-An International Survey’ www.consumerinternational.org/document_store/Doc29.pdf, December 2000 pp.29-30 it is stated that ‘By mandatory clauses...we mean ...mandatory ODR- or “ODR first” clauses-the consumer I oblige to use dispute resolution before going to court. Such clauses should not be enforceable, even where they do not deprive the consumer of legal recourse.’

emphasize that there should be clear information on the procedures.³⁵⁷ Consumer organisations are agreeable to regulation by voluntary codes of conduct provided that the governments also approve the voluntary codes or otherwise cooperate in the project.³⁵⁸

4.3.5 Attempts by Institutions of dispute resolution

There are many institutions of dispute resolution that are active in the promoting of ODR. This section will however only briefly review work by the ICC and the American Bar Association.

The ICC in addition to its involvement with AGB discussed above³⁵⁹ is under the process of creating a global B2C ODR clearinghouse that will be a worldwide central filing platform for B2C complaints. The clearinghouse would receive consumer disputes and refer them to appropriate ODRSPs.³⁶⁰ The appropriate ODRSP would be selected on a case-to-case basis among accredited ODRSPs who would commit to comply with the clearinghouse's forthcoming ODR standards. The ICC issued a set of best practices for B2C and C2C ODR³⁶¹ that set forth the following principles:

- System accessibility: users should have access to the system 24 hours a day, seven days a week, and all year round to file a new case or to review existing case information
- Convenience: the web site of the ODRSP should provide all the relevant contact information, as well as support in regard to procedural and technical issues
- Privacy and confidentiality: ODRSPs should observe data protection rules and maintain a high level of security. In addition, information communicated by one party to a mediator should not be disclosed to the other party without authorisation.
- Transparency: the dispute resolution procedure should be described to the parties in clear terms and in a fashion intelligible to consumers. The selection methods of third

³⁵⁷ G. Kaufmann-Kohler and T. Schultz, *supra*, pp.99-100

³⁵⁸ Such is the stand for organisations like the Transatlantic Consumer Dialogue, the European Consumers' Organisation and Consumer International

³⁵⁹ See section 4.3.3 above

³⁶⁰ G. Kaufmann-Kohler and T. Schultz, *supra*, p.104

³⁶¹ International Chamber of Commerce, 'Resolving disputes online. Best practices for Online Dispute Resolution (ODR) in B2C and C2C transactions'

www.iccwbo.org/home/e_business/word_documents/DIS-PUTES-rev.pdf, November 2003

neutrals, for instance, should be clearly set forth on the provider's website. Aggregated and anonymized caseload history should be made available

- Independence and impartiality: neutrals should be free of conflicts of interests

The American Bar Association has done a lot of work towards the regulation of both ADR and ODR. The association like the ICC has issued a code of best practices³⁶² with recommendations similar to those laid down by the ICC. In addition to those recommendations, the ABA recommends that the ODRSPs should set forth the methods used to monitor the neutrals and should further publish the procedures available to ensure their own accountability. The ABA promotes the notion that ADR or ODR should be a backup procedure that is only necessary if a customer is unable to get redress for their complaint.³⁶³ In other words they promote dispute prevention.

4.4 What then would be the core regulatory principles?

From the preceding observations it has been noted that all the stakeholders are keen on ensuring that ODR is promoted widely because of its enormous advantages to the players. In spite of these efforts there still remains, however, no international standard defining the principles for online arbitration. Although the regulatory initiatives reviewed above show significant variations of opinions among the stakeholders, nevertheless, there are some clearly understood basic principles that must exist. Online arbitration should be procedurally fair, effective, and predictable.³⁶⁴ In the field of B2C, preference should be given to outcomes that bind only the supplier, while B2B outcomes should probably be binding on both parties.³⁶⁵

³⁶² See www.law.washington.edu/ABA-eADR/home.html

³⁶³ See The American Task Force on E-Commerce and ADR, 'Addressing Disputes in Electronic Commerce. Final Report and Recommendations', available at www.law.washington.edu/ABA-eADR/home.html

³⁶⁴ Karen Stewart and Joseph Mathews, *supra*, para.1126

³⁶⁵ G. Kaufmann-Kohler and T. Schultz, *supra*, p.109

In order for the system to be fair, the system must provide reasonably equal access to any participant, regardless of wealth or location. The system must also have impartial and independent neutrals. For the system to be effective, it must be swift, affordable and must also provide a cost effective means of compelling parties to comply with decisions.³⁶⁶ Finally for the system to be predictable, it must be transparent, and decisions must strive for sufficient consistency so that parties feel safe in believing that their dispute will not be treated differently than similar preceding disputes.³⁶⁷

4.4.1 Fairness

All the stakeholders in ODR agree that ODR procedures must be fair. In adjudicative proceedings, fairness is equivalent to due process as it is traditionally understood, which encompasses equal treatment, impartiality and independence, and the right to be heard in adversary proceedings.³⁶⁸

Due process is much more demanding in processes ending with a binding outcome than in those that merely end in settlements. For instance in an adjudicative process the party must have an opportunity to comment on the case of the opponent as such an arbitrator may not meet privately with one party.³⁶⁹

Accessibility of the system is another principle that recurs in the various recommendations by the stakeholders. It comes out strongly that the ODR system must be easy to find, easy to use, and affordable. The rules of procedure developed should reflect the fairness of using each new tool as it becomes available and should be accessible even to low technology users.

4.4.2 Predictable

For a process to be predictable it is important that the arbitration process is transparent. It is agreed among the stakeholders that a clear description of the procedure must be

³⁶⁶Karen Stewart and Joseph Mathews, *supra*, para.1126

³⁶⁷*ibid.*

³⁶⁸G. Kaufmann-Kohler and T. Schultz, *supra*, p.119

³⁶⁹*ibid.* p.118

available, including the costs, the binding character of the outcome, and substantive rules or principles governing the merits.³⁷⁰ There must be disclosure as to the administration of the ODRSP, questions like who owns the enterprise and how is it funded must be addressed. In addition to the foregoing there should be disclosure of the qualifications of neutrals and the neutrals must be required to disclose any conflicting interests.³⁷¹

There must also be a clear description of the procedure which should not be deviated from without the parties' consent. The issue of publication of the outcomes is of great concern to the stakeholders.³⁷² Some of the actors advocate for anonymity in publication while others would like the parties named. When developing an ODR system there should be consideration of publication to varying degrees which must be clearly disclosed in the procedural rules. Though confidentiality is important opening the process to observance by interested parties would be a significant check on the process. Publishing decisions from online arbitration would go a long way toward showing that the process is an attempt to fairly resolve online disputes.³⁷³ Also, the reasons for keeping arbitral proceedings confidential are not as powerful when the dispute is between a consumer and a business as when the dispute is between businesses.³⁷⁴ It has been argued that at a minimum, providers of online arbitration should provide statistical information about the decisions of the arbitrators.³⁷⁵

4.4.3 Effective

For a system to be effective it must be swift. The stakeholders are mindful of the fact that speed is one of the major advantages of ODR. Business organisations and governments advocate a system that will be fast in resolving disputes meanwhile consumers advocate a system that will ensure that consumer rights are enforced. It is therefore important for the system to balance these requirements. The process should be

³⁷⁰G. Kaufmann-Kohler and T. Schultz, *supra*, p.110 quoting the agreement between Consumer International and Global Business Dialogue on electronic Commerce n.335 above

³⁷¹ This is in accordance to the agreement between CI and GBDe n.336 above

³⁷² Most of the recommendations reviewed above mention publication but with varying views.

³⁷³ Karen Stewart and Joseph Mathews, *supra*, para.1128

³⁷⁴ *ibid.*

³⁷⁵ *ibid.* and also see the recommendations of Consumer International n.336above

fast without compromising due process and must therefore take into account the complexity of a dispute when determining the duration.

In order for the system to be effective, it must have an efficient enforcement mechanism and must be more than just a step towards the courtroom door.³⁷⁶ These two aspects will be discussed further subsequently.

4.4.4 Binding outcome

The stakeholders are not agreed on whether ODR resolutions should, or even could, be binding on parties.³⁷⁷ When a question is asked as to whether ODR outcomes should be binding at all one does not help to think what purpose would a system that produces outcomes that have completely optional results serve? Questions like to what extent should the outcome be binding? Should it have the force of a judgment or just a contract? Most of the recommendations maintain that binding outcomes better protect the parties' interests because the binding character provides for certainty, finality and efficiency at low cost.³⁷⁸ According to these recommendations binding decisions are only welcome if they bind only the supplier and the consent to be binding is entered after the dispute arises. Development of a system that is procedurally fair and effective would remove all these doubts because the parties would be sure that their right would not be compromised and would therefore not mind that the decisions are binding.³⁷⁹

4.5 REGULATION OF ODR SERVICE PROVIDERS

Self-regulation: the better approach.

After defining the principles that should govern ODR there is need to ensure that the ODRSPs implement and comply with them. So far, countries' attempts at governing electronic commerce have treated the Internet as another area within their jurisdiction to

³⁷⁶ Karen Stewart and Joseph Mathews, *supra*, para.1127

³⁷⁷ See OECD, 'Building Trust in the Online Environment,' p.3

³⁷⁸ G. Kaufmann-Kohler and T. Schultz, *supra*, p.120

³⁷⁹ *ibid.*

be regulated.³⁸⁰ Application of traditional means of governance to online activity is often unsuccessful because the power of national sovereigns is derived from their ability to assert power over persons, and their jurisdiction is essentially defined by physical boundaries.³⁸¹ Of course it has been impossible for sovereigns to exert their control over cyberspace because the internet does not recognise geographic borders and its electronic state results in a lack of a physical presence of any one nation.

The better approach therefore may be to view the Internet as an independent jurisdiction that needs to be regulated by an interested international body rather than by any one nation or by treaties among nations.³⁸² Self-regulation therefore, rather than signalling a lack of law, merely ensures that rules governing activity are tailored to the needs of those they will affect.³⁸³

4.5.1 Clearing houses

A clearing house would be an intermediary between the disputants and the ODRSP. A clearing house offers information about providers and assists the disputants in choosing the most appropriate provider to handle or initiate the process.³⁸⁴ A clearing house would have control over the providers through selecting providers for referrals. In so choosing the clearing house would have a vetting process that would force the provider to keep up standards in order to be considered worth of selection.

There are currently two examples of clearing houses: the European Extra-judicial network (EEJ-Net) and the ICC's project of a 'Dispute Resolution Clearinghouse' (DCH).

³⁸⁰ Karen Stewart and Joseph Mathews, *supra*, para.1128

³⁸¹ *ibid.* para. 1121

³⁸² *ibid.*

³⁸³ *ibid.*

³⁸⁴ G. Kaufmann-Kohler and T. Schultz, *supra*, p.125

The EEJ-Net is an information support structure launched in 2001 by the European Commission to promote and facilitate the extra-judicial settlement of cross-border disputes.³⁸⁵ The EEJ-Net provides the services of: suggesting the most appropriate means of resolving a dispute, gives information on bodies deemed appropriate for the dispute, provides information on national small claims procedures and it monitors and stores information about complaints to guide future policy formulation.

The DCH has been described as having the potential to offer the services of: offering information on B2C projects; assisting parties choose the appropriate dispute resolution system; development of standard forms for submission of disputes; development of basic standards for B2C ADR and ODR to ensure minimum level of good practice and global conformity among providers; a posterior review of B2C ADR and ODR systems in response to complaints lodged with DCH; promotion of B2C ODR with companies that do not yet resort to such system.³⁸⁶

4.5.2 Accreditation

Accreditation of ODRSPs by independent entities may be another way of quality control. The accreditation body could play the role of providing information on the providers available. It could do this by merely providing the information of their addresses or may go a further step of describing the services offered by the different providers. The accreditation entity may go even further and periodically evaluate the ODRSPs and remove any providers that do not meet certain standard set by it from its directory. A good example of where the accreditation system has been applied is the ICANN's UDRP programme where there are currently four accredited providers.

³⁸⁵ G. Kaufmann-Kohler and T. Schultz, *supra*, p.126 also see www.eejnet.org

³⁸⁶ ICC Department of Policy and Business Practices, Commission on Telecommunications and Information Technologies, 'ICC and business-to-consumer Alternative Dispute Resolution in E-Commerce: A strategy Paper', DOC CTIT 373/404, 12th February 2000, presented by C.Kuner at the conference on ODR in Munster Germany, on 22 June 2001

If the requirements for the selection are defined, consistently applied, and compliance is regularly monitored, the control function of accreditation is undoubtedly achieved and its regulatory effect desirable.³⁸⁷ The reverse could also be true if the conditions are merely listed and not implemented.

4.5.3 Appellate bodies

Introduction of an appeal body could be another way of checking the operations of the ODRSPs. It has been argued that a full appeal on the issues of law would enhance the predictability of the outcomes of ODR, possibly its quality and credibility.³⁸⁸ The existence of an appeal may however reduce the quality of the first-instance decision and may unnecessarily protract the process thus eliminating speed which is the key advantage of ODR.

4.6 EFFECTIVE ENFORCEMENT OF ONLINE ARBITRATION

Attempts by governments to regulate ODR have been futile. Currently there seems to be no rule of law over cyber space. This has left its users in a dilemma. The current state of affairs makes all dealings online a major risk because one is never sure of the outcome. Even when one is sure of their rights and expectations they are not certain that they will have redress should these rights be violated or should these expectations not be met. As a result there is less use of the internet than would have been the case if there was certainty on the expectation.³⁸⁹

³⁸⁷ G. Kaufmann-Kohler and T. Schultz, *supra*, p.125

³⁸⁸ *ibid.* quoting M.S Donahey, 'Divergence in UNDRP and the need to for appellate Review' (2002) 5-11 Journal of internet Law 1

³⁸⁹ I talked with a cross section of consumers and got the general impression that they would not buy very expensive items over the internet and that even when they purchased items over the internet they did so from suppliers within their countries that way if anything went wrong they would have redress in their

In order for electronic commerce to continue to flourish, legal certainty should exist that commercial transactions finalized online will be enforceable in the physical world.³⁹⁰ A reliable and enforceable dispute resolution mechanism tailored specifically to the requirements of the electronic commerce environment would help in the development of such legal certainty.³⁹¹

On conclusion of a dispute the winning party may have either a settlement agreement or a decision that should ideally be realised. Should the losing party fail to comply with the outcome there should be means of assuring compliance. Section 3.3.1 discussed the obstacles facing enforcement of online arbitral awards and concluded that the NYC made it almost impossible to have them enforced.

In this section we go further to argue that even if the NYC were to be amended to recognize online arbitral awards and provide for their enforcement there would still remain a problem of having to enforce them through the courts. ODR provides its user with a shortcut to avoid long and expensive proceedings before a foreign court or forum, resorting to court to enforce its outcomes would defeat these benefits. Until ways are devised that ensure enforcement of ODR outcomes, ODR will not be an effective means of resolving disputes. ODR owes its users means of enforcing its outcomes that are as quick as obtaining them. There is therefore need to avoid the necessity of court enforcement by introducing other mechanisms, which either replace enforcement or create incentives for compliance.³⁹²

Because of its borderless nature, the internet has made it difficult for sovereigns to regulate its activities. As such if we were to wait for sovereigns to come up with a universal law to rule the internet, we would wait a very long time if not forever and yet the world can not afford the wait. This raises questions of: who will sculpture the set of

home courts. When asked whether they would purchase from suppliers out of their jurisdiction if they were assured of an effective way of enforcing the contract the answer was yes.

³⁹⁰ Gail A. Lasprogata, Virtual Arbitration: Contract Law and Alternative Dispute Resolution Meet in Cyberspace [19 Journal of Legal Studies Education 107 (2001)] p.2 accessed at

<http://international.westlaw.com/search/default> viewed on 20th August 2005

³⁹¹ *ibid.*

regulations to govern the operations on the internet? Who will devise the badly needed mechanisms to ensure that ODR is effective? Should the laws, customs and norms governing the internet be left to develop over a period of time like the law of the merchant?

The most effective means of regulating the internet and in turn ODR would be to leave its regulation in the hands of a group of internet stakeholders with a common interest in the development of fair, effective, and predictable means of resolving disputes caused by online transactions.³⁹³ This group would have the responsibilities of setting the rules and the penalties for their violation. The group would also provide means for executing the penalties.

Various means of enforcing ODR outcomes have been discussed at different forums. The most suggested means will be discussed below.

4.6.1 Trustmarks

A trustmark is a logo displayed on the website of the trader, which informs the customer that the trader is committed to certain qualitative standards or best business practices, including for instance redress mechanism.³⁹⁴ Trustmarks are aimed at giving the consumers confidence in the traders. If a trader does not comply with the set standards or fails to comply with any stipulations then the trustmark would be withdrawn from the trader.³⁹⁵ For example displaying a particular trustmark may be conditioned on subjecting all disputes emanating from all online transactions to online arbitration and ensuring that the outcomes are enforced. A consumer whose expectations are not met by the trader would have the right to file arbitration proceedings with the relevant ODRSP. If a trader fails to honour awards resulting from such arbitration the trustmark would be removed. Fear of having a reputation ruined by being stripped off a trustmark would give the trader an incentive to comply with the outcomes of ODR.

³⁹² G. Kaufmann-Kohler and T. Schultz, *supra*, p.210

³⁹³ Karen Stewart and Joseph Mathews, *supra*, para.1140

³⁹⁴ G. Kaufmann-Kohler and T. Schultz, *supra*, p.210p.225 basing on the definitions that were provided by the ABA Task Force on E-Commerce and ADR

³⁹⁵ Some ODRSPs like MARS, SquareTrade, WebAssured and NovaForum offer trustmarks

Good as the trustmark system may sound, would the risk of losing a trustmark be enough incentive for a trader to honour all ODR outcomes? Compliance would highly depend on the economic value that a trader attaches to its presence in the first place.³⁹⁶ And if there are a number of providers of trustmarks then traders might seek the ones with less stringent conditions. For an efficient trustmark system there may be need for close regulation and control over the trustmark providers by an independent body.

It should be noted that stripping a trader of the trustmark will not be redress enough for the consumer for the consumer would have gone through the proceedings and still not been compensated. Traders who would have been stripped of trustmarks would still be at liberty to trade thus putting other consumers at the risk of being treated in the same way. The system would therefore not be effective in getting the remedies sought by the users. In addition to this the fact that the absence of a trustmark on a trader's website would not necessarily indicate that a trader's product is substandard or that they have never had a trustmark or that they had a trustmark that was stripped off would still leave the consumer at crossroads.

Due to the foregoing loopholes the trustmark system is not the effective way of ensuring that ODR outcomes are enforced.

4.6.2 E-bay/SquareTrade

eBay, an online auction house, provides two complimentary services to its sellers and buyers. One is a trustmark by SquareTrade, an ODRSP that provides an online mechanism for resolving disputes arising between the sellers and buyers using eBay. The second one may be categorized as a reputation management system, a grading or point system.³⁹⁷ Whenever a trader fails to abide by ODR outcomes or falls short of any requirements that trader gets poor grades and as a result loses points. The grading is publicly accessible to the users of the website. All eBay members, both buyers and sellers, receive feedbacks from other members who have engaged in transactions with them and a summary of the results of the feedback is presented next to the member's

³⁹⁶ G. Kaufmann-Kohler and T. Schultz, *supra*, p.226

user identification.³⁹⁸ Buyers interested in transacting with the trader can view the feedbacks and ratings at the material time when they wish to transact with that trader without having to go to another website. This makes this system more practical than the trustmark system. The risk of bad publicity as a result of poor rating creates an incentive to comply with the ODR outcomes.³⁹⁹

This system presupposes that a consumer will check out the ratings of a trader before they deal with that trader but this is not always the case. Displaying feedbacks and ratings by clients may be required of traders but this can only be a part of the solution and not the absolute solution to effective enforcement of ODR outcomes.

4.6.3 Escrow systems.

In an escrow system the funds are not paid directly to the seller but instead the buyer deposits the funds in an account held by a third party, the escrow agent. The escrow agent in turn informs the seller that payment has been made. On receipt of the confirmation the seller executes delivery of the goods in question. The escrow agent after verification that delivery was made transfers the funds to the seller. However, should the buyer raise a complaint within a predetermined inspection period then the escrow agent would freeze the funds awaiting a settlement by the parties or an outcome of proceedings by the parties. The escrow agent would then transfer the funds in accordance with the settlement or outcome of the proceedings. The parties would have agreed on the mode of settlement of disputes before hand. EBay provides for payment through an escrow for high priced items and requires the buyers to enter a separate agreement with the sellers for this.⁴⁰⁰

ODR may employ the system in such a way that prior the determination of a dispute the party being sued would pay the disputed sum of money into the account an escrow agent

³⁹⁷ *ibid.*

³⁹⁸ Karen Stewart and Joseph Mathews, *supra*, para.1141

³⁹⁹ G. Kaufmann-Kohler and T. Schultz, *supra*, p.227

⁴⁰⁰ EBay uses Escrow.com, look at www.ebay.com/securitycenter/paying_safely also look at www.escrow.com/support/faq/index for details of how the system works. For similar work also look at G. Kaufmann-Kohler and T. Schultz, *supra*, p.228

who could as well be the ODRSP. This way when proceedings are concluded the winner will not be faced with issues of enforcement. It goes without saying that an escrow system would go a long way in alleviating the problems faced by online consumers.

4.6.4 Credit card charge backs

Credit card charge backs may be another means of enhancing the effectiveness of ODR outcomes. This may be accomplished by including a clause in the contract between the card issuer and the cardholder that would refer certain disputes resulting from or connected to payments on the card to a predefined ODR procedure. At the same time there would also be a clause in the contract between the card issuer and the vendor that would also refer any disputes to that predefined ODR procedure. Finally the contract between the cardholder (the buyer) and the vendor would also refer disputes to that ODR procedure. These contracts would bind the card issuer, the cardholder and the vendor to the ODR outcome. The card issuer would execute the chargeback in accordance to the ODR outcome.

The provisions of these contracts should in no way prejudice the rights that are accorded to the parties by their different jurisdictions. For example rights arising from unauthorised or fraudulent use of credit cards.⁴⁰¹

An ODR enforcement system that is based on a well designed credit card charge back system that does not prejudice the parties' right would indeed go a long way in making ODR effective.

4.6.5 Cyber currency

It is argued that eventually, as international B2C commerce matures, a cyberspace currency or "e-purse" is certain to develop.⁴⁰² Some technologists have predicted the use

⁴⁰¹ For details on European and US regulations providing the right to cancel payment and to be re-credited with sums paid, please look at G. Kaufmann-Kohler and T. Schultz, *supra*, pp.230-231 for a similar write up on the issue of credit card charge backs.

of cybercash from cyberaccounts resting on a cyberconsumer's web browser or personal web page that will become part of the international banking and credit card industry.⁴⁰³ When this eventually develops, a component of referring disputes to ODR and enforcement of the outcomes could be incorporated in the relevant contracts

4.6.6 Judgment funds

A judgment fund is a permanent account supplied with contributions from one or all parties likely to resort to a given dispute settlement process, out of which amounts determined or agreed to be due are paid out to the prevailing party.⁴⁰⁴ An example of this is the United Nations Compensation fund for the victims of Iraq invasion of Kuwait during the first Gulf War.⁴⁰⁵ The source of income for the fund is 30 per cent of the revenues from the sale of Iraq oil.

The fund could be established by a single trader or a group of traders or an association of traders. This could be entrusted in the control of a third party who could be an ODRSP. The fund would then be utilised for satisfying ODR outcomes involving the establishers.

4.6.7 Insurance

Another avenue that would contribute toward making ODR outcomes effective would be to require all online vendors to take out insurance to cover their liability in case disputes arise from their online transactions. The insurance being suggested could work more like the motor vehicle third party insurance. Besides requiring the vendor to take out insurance, the vendors would also be required to refer predefined disputes to ODR. The vendors would then include an ODR clause in the agreements with their clients. The insurance company would then be obligated to comply with the ODR outcomes that are covered.

⁴⁰² Karen Stewart and Joseph Mathews, *supra*, para.1142 R. Pichler, 'Finality of Credit Card Payments and Consumer Confidence-Different approaches in the United States and in Europe' (2001) 5 *Electronic Payment Systems Observatory Newsletter* which may be viewed at <http://epso.jrc.es/newsletter>

⁴⁰³ *ibid.*

⁴⁰⁴ G. Kaufmann-Kohler and T. Schultz, *supra*, p.229

⁴⁰⁵ *ibid.*

4.6.8 ICANN'S UDRP Model

Another mechanism that would ensure effectiveness of ODR outcomes would be the employment of technology in their enforcement. The process would work similar to ICANN's UDRP. In the proposed system the control of online vending would be entrusted to an independent entity constituted by a representative body of stakeholders. This body would have the responsibility of drafting regulations and penalties.

As far as dispute resolution is concerned the body would require that all registrants who trade online to go through some sort of registration or it could be pegged on the domain name registration. In a way the body would in essence issue the vendor with a "licence" to trade on line. This "licence" would have conditions. One of the conditions would be that the registrant agrees to submit to a mandatory administrative proceeding should any of their buyers or clients file a complaint against the registrant. The licence would also stipulate penalties.

Giving the body the power to order credit card cash backs or freeze the website (to make it inaccessible by vendors or to deregister the domain name from the trader if a trader fails to comply with the ODR outcomes against him.

The body could also control the operations of ODRSP, escrow agents, cybercash providers. As long as its regulations are well crafted with input from the internet stakeholders, the sky could be the limit of what it would control and how. But who would constitute the stakeholders?

It is suggested that stakeholders to constitute the representative body and to help in the drafting of the regulations would include but may not be restricted to: consumer groups, online businesses, ICC and UNCITRAL.⁴⁰⁶

4.7 CONCLUSION

The internet has removed distances between places that the aero plane or the telephone had only tried to reduce. Prior to the internet most international trade was between businesses and not between businesses and consumers. The evolution of the internet made it possible for a consumer in Japan to trade with a business in Cape Town instantly at the click of a mouse.

There are however no roses without thorns. The internet brought some thorns. Disputes between its users are some of the thorns. The thorn-pricks are felt much more vividly by the consumer who is vulnerable and weak in an environment dominated by business enterprises.

In the world before the internet there were established means of settling disputes. The old means of settling disputes were however not well suited for this new fast world. As a result a new means of settling disputes, ODR, using this new medium emerged. Like all developing things it has encountered problems which when over come will be an effective way of resolving online disputes, and more especially international disputes.

ODR boasts of many ways of resolving disputes. While the role played by other ADR methods such as negotiation and mediation has been noted, arbitration has been earmarked as the most suitable means of resolving disputes because it produces

⁴⁰⁶ For similar works look at Karen Stewart and Joseph Mathews, *supra*, para.1143

outcomes that may be enforced by the courts without first obtaining a judgment. Online arbitration though full of potential of cheaply, quickly and finally resolving both online and offline disputes is currently faced with many obstacles that have limited its effectiveness.

The major obstacle that has been sighted is the enforcement of its outcomes under the NYC. Another major obstacle is the varying consumer protection laws most of which consider invalid a binding arbitration agreement between a business and a consumer. Online arbitration may be the only chance at obtaining justice for an online consumer buying from a distant country and yet some consumer protection laws insist that the consumer may only bind herself after the occurrence of the dispute. A solution to this would be to adopt unilaterally binding ODR clauses on the trader.

There is need to work around the obstacles and develop an effective online arbitration system that will enhance consumer confidence in the online environment. It has been noted that even if the current laws were to be amended in such a way that made online arbitral awards enforceable in courts this would still not offer the desired quick remedy because it would still necessitate going to a court to enforce the awards.

ICANN's Uniform domain name Dispute Resolution Policy stands out as a major success story. Its success has been attributed to mainly the fact that it has self enforcement mechanisms. It was also noted that backing of ODR by accrediting trade associations gave an incentive to parties to comply with ODR outcomes or risk to be excluded from the trade association.⁴⁰⁷

⁴⁰⁷ This is the case with (Association of British Travel Agencies that use CIA to mediate or arbitrate travel disputes in UK.

The successes recorded by UDRP leads to only one conclusion that it is important to develop an online arbitration system that has self enforcement mechanisms that would ensure that its outcomes are realised. The system devised should be accessible, fair, predictable, qualitative and inexpensive. In devising the system the core groups that should be involved are: consumer groups, business groups, UNCITRAL and ICC.

To ensure the quality and the smooth running of ODR, there is need for its regulation. There is need to regulate the operations of the providers. Standards have to be set and enforced short of this ODR may produce unacceptable outcomes and instead of building consumer confidence it will produce consumer mistrust.

Governments' efforts to legislate for and to regulate ODR have not yielded much mainly because the internet surpasses borders and because of the different ideologies and dreams of what rules should be put in place. The nature of the internet makes it better suited to be regulated by a body independent of any country. A body that has a membership whose common goal would be to foster confidence is using the internet which will translate in its flourish.

ANNEXES

A. Abbreviations

AAA	American Arbitration Association
ABA	American Bar Association
All ER	All England Reports
B2B	Business to Business
B2C	Business to Consumer
BGB	<i>Bürgerliches Gesetzbuch</i> (German Civil Code)
C2C	Consumer to Consumer
CEDR	Centre for Effective Dispute Resolution
CIDR	Coalition of Internet Dispute Resolvers
Ecommerce	Electronic Commerce
EC	European Communities
EDI	Electronic Data Interchange
EEJ-NET	European Extra-Judicial Network
EU	European Union
GBDe	Global Business Dialogue on Electronic Commerce
ICANN	Internet Corporation for Assigned Names and Numbers
ICC	International Chamber of Commerce
DCH	Dispute Resolution Clearinghouse
Med-Arb	Mediation Arbitration
ODR	Online Dispute Resolution
ODRSP	Online Dispute Resolution Service Provider
OECD	Organisation for Economic Cooperation and Development
PIL	Private International Law
SPIDR	Society of Professionals in Dispute Resolution
UDRP	Uniform Domain Name Dispute Resolution Policy
UNCITRAL	United Nations Commission on International Trade Law
WIPO	World Intellectual Property Organisation

B. List of Online Arbitration providers

This information was adapted from G. Kaufmann-Kohler and T. Schultz, *Online Dispute Resolution-Challenges for Contemporary Justice*. The information was based on direct contact (face-to-face interviews or email contact) with representatives of the concerned ODRSPs.⁴⁰⁸

1.

Name of provider American Arbitration Association	ULR www.adr.org	Location USA	Year of establishment 2001
Name(s) of program(s) AAA WebFile		Service provided Arbitration	

⁴⁰⁸ See G. Kaufmann-Kohler and T. Schultz, *supra*, pp.249-277

<p>Communication Tools</p> <p>Web-based platform(online filing form-except for consumers bulletin board, document center, case tracking, and live case manager) and email</p>	<p>Duration of proceedings</p> <p>Between 13 and 16 months</p>
<p>Type of disputes</p> <p>Single and multiparty disputes in a wide variety of fields (commercial, consumer, insurance, employment, etc.) and in particular domain name disputes.</p>	
<p>Fee structure(in USD)</p> <p><u>For business:</u></p> <p>500(+200 if a hearing takes place) for claims up to 10 000.</p> <p>750(+300 if a hearing takes place) for claims between 10 000 and 75 000.</p> <p>1 500 for claims exceeding 75 000</p> <p><u>For consumers:</u></p> <p>125 or less for claims up to 10 000</p> <p>375 or less for claims between 10 000 and 75 000</p> <p>1500 for claims exceeding 75 000.</p> <p>Full or partial refund in case of settlement or withdrawal of the case within a certain period.</p>	
<p>Volume of cases;</p> <p>About 1,000 case have been filed on line, but none of them has been resolved online.</p>	

2

Name of provider Arbitrajey Mediacion (ARyME)	URL www.aryme.com	Location Spain	Year of establishment January 2002
Services provided Mediation, arbitration, early neutral evaluation, mini-trial.		Duration of proceedings A few months	
Communication Tools Web-based platform(online filing interactive conference rooms)			
Types of disputes Commercial disputes(B2B)		Languages Spanish and English	
Fee structure (in EUR) <u>National arbitration:</u> Admistrative fees: 1 000 for claims up to 10 000 2 500 for claims between 10 001 and 50 000 5 000 for claims between 50 001 and 250 000 15 000 for claims between 250 001 and 1m 20 000 for claims between 1m and 5m 25 000 for claims exceeding 5m +arbitrator fee per hour <u>International fees:</u> 1 000 for claims up to 10 000			

3 000 for claims between 10 001 and 50 000 7 500 for claims between 50 001 and 250 000 15 000 for claims between 250 001 and 1m 20 000 for claims between 1m and 5m 25 000 for claims exceeding 5m +arbitrator fee per hour
Comments The ODR service is offered in cooperation with Online resolution , a US ODRSP

3.

Name of provider Asian Domain Name Dispute Centre(ADNDRC)	URL www.adndrc.org	Year established 2001
Location China	Services Provided UDRP non-binding arbitration.	
Communication Tools Web-based online system and email. Filing must be undertaken in both online and offline form		
Types of disputes Domain name disputes for .com, .net, .org, .biz, .aero, .museum, .info, .pro and .coop.		
Fee structure (in USD) 1 000 (single panelist)/2 500 (three panelist) for 1 and 2 domain names. 1 200 (single panelist)/3 500 (three panelist) for 3 and 5 domain names. 1 600 (single panelist)/3 600 (three panelist) for 6 and 9 domain names. 3 000 (single panelist)/7 000 (three panelist) for 10 domain names or more. + Additional fees in case an in-person hearing is required.		
Duration of proceedings Generally less than 60days	Volume of cases 50	

4.

Name of Provider Bankers Repository Corporation	URL www.theBRC.com	Location USA	Year established 1999
Name of program(s) Resolutionizer 7000Desktop Console		Service Provided Mediation and non-binding arbitration	
Communication means Highly designed web-based console (including online filing and all subsequent communications)		Duration of proceedings -8 days(in average 3 days)	
Type of disputes Commercial disputes		Language English	
Fees structure (in USD) 300 for settlement amounts under 50 000 400 for settlement amounts between 50 000 and 74 999			

400 for settlement amounts between 75 000 and 99 999 400 for settlement amounts between 100 000 and 124 999 400 for settlement amounts between 125 000 and 174 999 400 for settlement amounts between 175 000 and 244 999 1 400 for settlement amounts between 250 000 and 344 999 1 700 for settlement amounts between 350 000 and 444 999 Fees on request for settlement amounts of 500 000 and above If acceptable results cannot be obtained, no fees are due
Settlement rate Around 60%

5.

Name of provider Better Business Bureau Online	URL www.bbbonline.com	Location USA/Canada	Year of establishment 1999
Name of program(s) BBBOnline BBB AUTO INE BBB Wise Giving Alliance	Service provided Complaint handling	Languages English, Spanish, French	
Communication means Web-based online filing form	Duration of proceedings Generally less than 30days		
Type of disputes B2C complaints, complaints between consumers and automobile manufacturers, charity inquires or complaint, privacy complaints			
Fees structure No national BBB program charges consumers any participation fee. Local BBB programs generally do not charge consumers for participation, although a few have a nominal filing fee(less than UDS 50). Consumers are responsible for their own expenses (e.g. attorney fees or costs obtaining evidence).			
Comments Dispute resolution is handled by BBB offices offering traditional ADR services. BBB furthermore plans o set up automated negotiation, online mediation and arbitration services			Volume of cases 1700

6.

Name of provider The Chartered Institute of Arbitrators(CI Arb)	URL www.arbitrators.org	Location UK	Year of establishment 2000
Name of program(s) <ul style="list-style-type: none"> - The Independent Dispute Resolution Service For Purchasers From FordJourney - The Independent Arbitration Scheme for the Travel Industry provided for the Association of British Travel Agents (ABTA) - The European Extra-Judicial Network(E EJ-Net) Dispute Resolution Scheme - The Musician's Union Dispute Resolution Scheme - The Online Construction Adjudication Scheme - The Online Climate Change Adjudication Scheme 			

Service provided Arbitration(e.g. ABTA) Non-binding arbitration(eg FordJourney) Med-arb(e.g. The Musician's Union) Mediation Adjudication(e.g. Online Construction Adjudication Scheme) Early neutral evaluation	Duration of proceedings Generally between 40 and 85 days depending on the scheme	Language English
Communication means Web-based platform (online filing form, online payment), emails, other tools of communication accepted but not provided b the Institute		
Type of disputes Various, mainly B2C and B2B disputes (music, construction, ecommerce, household, funeral services, leisure and travel, telecommunication disputes, insurance claims, etc) but also disputes with governmental bodies as part of the new Online climate change adjudication scheme (tax reductions dependant on meeting specific environmental standards)		
Fee structure Registration fees depend on the selected scheme and the claim amount (e.g. from GB72.85 to GP 164.50 for the ABTA scheme). Arbitrator's and mediator's fees depend on he selected scheme (some schemes charge a flat rate, e.g. under the Musician's Union' scheme, GBP 80 per hour for the arbitrator's fees with an hour cap and GBP 200 administrative fee; in other schemes, arbitration fees may be subject to the arbitrator's discretion, e.g. ABTA).		
Volume of cases Approximately 400		

7.

Name of Provider Cibertribunal Peruano	URL www.cibertribunalperuan.org	Location Peru	Year of establishment 1999
Service provided Mediation and Arbitration	Languages Spanish, English, and Languages chosen by the parties and the mediator/arbitrator		
Communication means Web-based platform(chat rooms, IP telephone, videoconference),email(case filing)	Duration of proceedings Mediation: One week Arbitration: up to 3months		
Types of disputes Online dispute , e.g ecommerce(commercial dispute, unfair competition, publicity and marketing), intellectual property and domain names disputes, consumer protection, privacy protection, torts, etc			
Fee structure <u>Administrative fees:</u> 500 for disputes up to 30 000 500 + 1.5 per cent over 30 00 for disputes between 30 001 and 60 000			

950 + 1 per cent over 60 00 for disputes between 60 001 and 100 000 1 350 + 0.5 per cent over 100 00 for disputes over 100 000 <u>Arbitrator's fees:</u> 1,000 for disputes up to 30 000 1,000 + per cent over 30 000 for disputes between 30 001 and 60 000 2 500 + 2 per cent over 60 00 for disputes between 60 001 and 100 000 4 300 + 2 per cent over 100 00 for disputes over 100 000
Volume of cases 30 cases of mediation and 'several' cases of arbitration

8.

Name of provider CPR Institute for Dispute Resolution	URL www.cpradr.org	Location USA	Year of establishment 2001
Services provided UDRP Non-binding arbitration			
Communication tools Offline filing; all subsequent communications take place via email.			
Types of disputes Domain name disputes	Languages English, French, German, Spanish, and Italian		
Fees structure <u>Single panelist disputes (fees to be paid by complainant)</u> 2 000 for 1 or 2 domain names 2 500 for 3-5 domain names 1 000 + panelist fee to be decided in consultation with CPR for 6 and more domain names <u>Three-person panel disputes (fees to be split between the parties)</u> 4 500 for 1 or 2 domain names 6 000 for 3-5 domain names 1 500 + panelist fee to be decided in consultation with CPR for 6 and more domain names			
Volume f cases 100			

9.

Name of provider Cyberlaws.Net	URL www.cyberarbitration.com	Location India	Year of establishment 1998
Name of program(s) Cyberarbitration.com		Service provided Arbitration	
Communication tools Email and offline hearings if desired by the parties			
Types of disputes All disputes referring to information technology and the internet,(e.g. ecommerce, including e-contracts, business process outsourcing disputes, information security, intellectual property, domain name disputes, etc).			
Volume of cases 60		Language English	

10.

Name of provider Dispute Manager.com	URL www.disputemanager.com.sg	Location Singapore	Year of establishment
Name of Program(s) DisputeManager.com		Services provided ‘E-settlement’ (automated negotiation), mediation, early neutral evaluation, arbitration in domain name disputes	
Communication tools Web-based platform(online filing form, videoconferencing, real time communication(‘private chat rooms’), shared application facilities), emails			
Types of disputes Monetary claims, disputes on Singaporean Country Code top Level Domain names9ccTLD), i.e. .sg		Language English, other possible languages not specified	
Fee structure (inSGD) <i>note: SGD 1 is approximately worth USD 0.6</i> <u>E-Settlement (fees per party):</u> 10 per party for each round for the first three rounds, and 40 for round 4 and 5 <u>Mediation fees(per party):</u> 500 administrative fee 1 800 or 3 600 (for two mediators) per day for claims up to 250 000 3 600 or 6 000 (for two mediators) per day for claims up to 250 000 and 1m 4 800 or 8 000 (for two mediators) per day for claims up to 250 000 between 1m and 5m 4 800 or 4 000 (for two mediators) + 0.05 per cent of the quantum above 5m per day for claims up to 250 000 and 5m <u>Neutral evaluation:</u> 4 per cent of 250 000, subject to a minimum of 500 for claims up to 250 000 1 000+ 0.2 per cent of excess over 250 000 for claims between 250 00 and 1m 2 500+ 0.05 per cent of excess over 1m for claims between 1m and 10m			

7 000 for claims above 10m +evaluator fees, depending on the evaluator and ranging from 200 to 1 000 per hour <u>Domain name disputes costs are generally borne by the complainant):</u> 2 750 or 5 500 (for a three-amber panel)for 1 to 5 domain names 3 500 or 7 000 (for a three-amber panel)for 6 to 10 domain names 4 250 or 8 500 (for a three-amber panel)for 11 to 15 domain names
Duration of proceedings E-Settlement: max 5 rounds of 72 hour each No information available on the other services

11

Name of provider Electronic Commerce Dispute Resolution (ECODIR)	URL www.ecodir.org	Location Ireland	Year establishment 2001
Service provided Tiered process: negotiation, Mediation, and recommendation			
Communication tools Web-based platform (online filing form and asynchronous tools, e.g. message board), offline tools(eg fax).	Duration of proceedings Maximal 44 days		
Type of disputes E-commerce disputes (B2C)	Languages English and French		
Fee structure The current pilot project is free	Volume of cases/settlement Rate 62 cases were filed during he pilot project phase		

12.

12.			
Name of provider eNeutral	URL www.eneutral.com	Location USA	Year of establishment 2001
Service provided Case evaluation, mediation, arbitration	Types of disputes Commercial disputes (B2C)	Languages English other possible languages not specified	
Communication tools Web-based platform (online filing form, videoconference, net-meeting or any video transmission web-based site.), email.		Duration of proceedings Typically between 2 and 5 hours for mediation and about a month for arbitration	
Fee structure ⁹ in USD <u>Mediation:</u> 250 per hour per party with a two hour minimum, and 200 per party every hour after <u>Arbitration:</u> 20 per party per arbitrator with a two-hour minimum, and 200 per party per arbitrator every hour after			

Videoconferencing fee is included in the ADR fee
Settlement rate 74 per cent settlement in mediation

13

Name of provider iCourthouse	URL www.i-courthouse.com	Location USA	Year of establishment 1999
Services provided Adjudication and dispute evaluation(depending on whether the parties agree to make the outcome binding), case evaluation for attorneys and other risk-evaluation professionals(JurySmart)			
Communication tools Online filing through web-based form, web-based platform, email, etc			
Type of disputes All types of disputes, e.g. civil(landlord and tenant, tort, etc), insurance		Language English	
Fee structure USD 180 for JurySmart service. The regular adjudication procedure is free of charge		Volume of cases 350	

14

Name of provider JAMS	URL www.jamsard.com	Location USA	Year of establishment 2002
Services provided Arbitration (including non-binding arbitration), early neutral evaluation, mini-trial, mediation, med-arb			
Communication tools Web-based platform(online filing form, videoconference, etc), email			
Types of disputes Single and multiparty private disputes (e.g. commercial, bankruptcy, class action and mass tort, employment, personal injury, security etc) and e-government		Language English	
Fee structure (in USD) 200 administrative fee and 250 per hour for an affiliated arbitrator and 400 per hour for on-affiliated arbitrator			

Name of provider Mediation Arbitration Resolution Services(MARS)	URL www.resolvemydispute.com	Location USA	Year established 1999
Name of Program(s) Mars adr Program (negotiation, mediation, arbitration SuperSettle Program 9utomated negotiation) Fair&Square Program (B2C ecommerce disputes)		Language English	
Types of disputes All types of disputes (eg commercial disputes, personal injury, insuranr claims, medical claims, etc			
Communication tools Web-base platform (online filing form, ‘the Internet’, videoconference.) Process can be complemented by offline tools (e.g. teleconference)		Duration of proceedings Maximum 30 days for MARS ADR Maximum 15 days for SuperSettle Maximum 15 days for Fair&Square	
Service provided Automated negotiation, assisted negotiation, mediation, arbitration, med-arb (fast track program)			
Fee structure(inUSD) 25 filing fee per party, plus: Notification and negotiation: 150 per party (MARS ADR) Mediation and arbitration: 225 per party 125 per party (MARS ADR) per additional hour Automated negotiation 50 registration fee +75 settlement fee for claims between 1 000 and 5 000 75 registration fee + 5 per round +100 settlement fee for claims between 5 001 and 10 000 100 registration fee + 10 per round +100 settlement fee for claims between 10 001 and 25 000 125 registration fee + 15 per round +100 settlement fee for claims between 25 001 and 50 000 B2C ecommerce disputes 100 for claims under 1 000 or 15 percent of the settlement amount with a minimum of 150 split between the parties (50/50) (Fair&Square)			

16.

Name of provider The National Arbitration Forum	URL www.arb-forum.com	Location USA	Year established 1999
Service provided Mediation, arbitration, med-arb (latter only for insurance claims)		Duration of proceedings Typically between three and six months	
Communication means Domain names disputes; Online and offline filing through web-bases form and by post, email Other disputes: Web-based online filing and online payment forms, email, offline tools (e telephone0			
Types of disputes Commercial Disputes B2B, B2C, C2C) domain name disputes, employment, healthcare, insurance, etc		Languages English, other possible languages not specified	
Fee structure(in USD) <u>Domain names disputes:</u> 1 150 (2 500 for a three-member panel) for 1 disputed domain name 1 300(2 600 for a three-member panel) for two disputed domain names 1 400(2 800 for a three-member panel) for 3 to 5 disputed domain names 1 750(3 500 for a three-member panel) for 6 to 10 disputed domain names 2 000(4 000 for a three-member panel) for 11 to 15 disputed domain names For disputes involving 16 or more domain names, fees are to be determined in consultation with the forum <u>Other disputes</u> 250(+ 150 possible hearing fee) for claims below 2 500 320(+ 150 possible hearing fee) for claims between 2 501 and 5 000 420(+ 300 possible hearing fee) for claims between 5 001 and 10 000 520(+ 300 possible hearing fee) for claims between 10 001 and 15 000 770(+ 500 possible hearing fee) for claims between 15 001 and 30 000 1 170(+ 750 possible hearing fee) for claims between 30 001 and 50 000 1 730(+ 1 000 possible hearing fee) for claims between 50 001 and 74 999 750 +1 per cent of he excess over 75 000 for claims between 75 000 and 100 000 1 000 +0.75per cent of he excess over 100 000 for claims between 100 001 and 500 000 4 000 +0.25 per cent of he excess over 500 000 for claims between 500 001 and 1m 5 250 +0.1 per cent of he excess over 1m for claims between 1 000 001 and 10m 16 000 for claims above 10m			
Volume of cases 4 000			

17

Name of provider National Arbitration and Mediation(NAM)	URL www.clicknsettle.com	Location USA	Year established 1992
Name of program(s) ClickNsettle		Service provided National and international arbitration and mediation	
Communication means Web-based platform(online filing form, web-based tools, eg case management, videoconferencing)			
Types of disputes Civil and commercial disputes (e.g. B2C and B2B disputes, matrimonial disputes, tort, labor and employment disputes)			Language English

18

Name of provider NovaForum	URLs www.novaforum.com www.TheElectronicCourthouse.com	Location Canada	Year established 2000
Name of program(s) The Electronic Courthouse Resolution Room	Service provided Mediation, arbitration, med-arb, early neutral evaluation (non-binding arbitration)		Duration of proceedings Standard duration is four hours
Communication means Web-based platform(online filing form, case management, videoconferencing and back office, Resolution Room: conference room allowing synchronous and asynchronous communication, white board, chat, optional videoconference), email alerts, offline tools such as teleconferencing)			
Types of disputes Many commercial disputes including contract, corporate, IT and IP, employment and labour, class action, and other disputes.		Languages Full multilingual service including document translation and synchronous oral translation during resolution session	
Fee structure(in USD) 2 500 flat fee per party for six hours 400 per party for additional 2-hour blocks			
Volume of cases Over 100			

19

Name of provider Online Resolution Inc.	URL www.onlineresolution.com	Location USA	Year established 2000
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Service provided Single and multiparty disputes, early neutral evaluation, mediation, arbitration, and negotiation.	
Communication means Web-based platform (online filing form, asynchronous communication tools, file sharing, sharing, chat, threaded messages, deliberative surveys and polls, calendars, instant messages)	Duration of proceedings From two weeks for interpersonal disputes to several months for multiparty disputes
Types o disputes All types of disputes (B2C and B2B disputes, business, ecommerce, employment, family disputes, insurance claim, etc)	Languages English, French and Spanish
Fee structure (in USD) 50 per party/hour with minimum 2hours for disputes up to 10 000 72 per party/hour with min. 2 hours between 10 000 and 50 000 100 per party/hour with min. 2hours for disputes exceeding 50 000	
Volume of cases/ settlement rate 200	

20

20

Name of provider Private Judge	URL http://privatejudge.com	Location USA	Year established 2001
Service provided Early neutral evaluation, mediation, arbitration, referee/special master (or complex multiparty disputes)			
Communication means Web-based platform (online filing form, instant messaging, online meeting, online submission of documents via NowDocs) Process can be completed by offline tools, e.g. teleconferencing		Duration of proceedings One day for typical mediation and 3 to 10 days for typical arbitration	
Types of disputes Focus on single and multiparty business disputes, particularly in life science, technology and intellectual property fields		English, other possible languages not specified	
Fee structure (in USD) <u>Early neutral evaluation</u> 500 per party for up to 30 pages submission <u>Mediation</u> From 2 000 to 5 000 per party per day <u>Arbitration</u> Administration fee 1 200, arbitration fee depends on the ti and complexity of the dispute <u>Referee/special Master</u> Fees are determined per task			

21

Name of provider Resolution Canada	URL www.resolutioncanada.ca	Location	Year established 2000
Service provided Arbitration		Duration of proceedings Typically 14 days	
Communication means Web-based platform (online filing form, chat, ‘online meeting’), email, offline tools such as teleconferencing			
Types of disputes Domain name disputes (.ca domain name on the CIRCA registry)		Languages English and French	
Fee structure (in CAD) 1 750(4 300 for a three-member panel) for one domain name 2 250 (4 900 for a three-member panel) for 2 to 5 domain names 3 250 (5 400 for a three-member panel) for 6 to 10 domain names Fees for 11 domain names and more are to be reviewed on a case by case basis			

22

Name of provider SettleTheCase.com(STC)	URL www.settlethecase.com	Location USA	Year established 2000
Name of program(s) Moneywise and ADRdoctor		Service provided Mediation, arbitration and summary jury trial	
Communication means Web-based platform (online filing form, virtual arbitration/mediation chat rooms)			
Languages English, other possible languages not specified			

23

Name of provider Singapore Mediation Centre(SMC)	URLs www.mediation.com.sg www.disputemanager.com.sg	Location Singapore	Year established 2002
Name of program(s) DisputeManager.com	Services provided Automated negotiation(‘E-Settlement’), mediation, neutral evaluation, Singapore Domain Name Resolution Policy		
Communication means Web-based platform(online filing form, real time communication, i.e. ‘private chat rooms’, shared application facilities,)email			
Types of disputes All civil and commercial disputes, including ecommerce transactions, intellectual property rights, domain names etc		Languages English, other possible languages not specified	

<p>Fee structure(inSGD):SGD 1 is approximately USD 0.6</p> <p>E -Settlement (per party)</p> <p>10 per party for each round for the first three rounds, and 40 for rounds 4 and 5</p> <p>Mediation(per party)</p> <p>50 administration fee per party</p> <p>900 or 1 800(for two mediators) for claims up to 250 000</p> <p>1 800 or 3 000(for 2 mediators) for claims between 250 000 and 1m</p> <p>2 400 or 4 000(for 2 mediators) for claims between 1m and 5m</p> <p>2 400 or 4 000(for 2 mediators) +0.05 per cent of the quantum above 5m per day for claims above 5m</p>
<p>Duration of proceedings</p> <p>Can take several minutes to hours or days (depending on the case and the parties' response time)</p>

24

24

Name of provider Subordinate courts of Singapore	URLs www.subcourts.gov.sg www.e-adr.gov.sg www.justiceonline.com.sg www.malclaims.gov.sg	Location Singapore	Year established 2002(JusticeOnline) 2000(e@adr) 1997(SCT)
Name of program(s) e@adr online mediation		Service provided Mediation and litigation	
Communication means Web-based platform(online filing form, videoconferencing system(JusticeOnline),email		Languages English, other possible not specified	
Types of disputes All civil and commercial disputes, including ecommerce transactions, intellectual property rights, domain names etc			
Fee structure (in SGD) SGD 1 approximately USD 0.6 Services provided by e@adr online mediation are free of charge Small Claims Tribunal Claim amount up to 5 000: 0 (consumer)50 (non-consumer) Claim amount between 5 000 and 10 000: 20 (consumer) 100 (non-consumer) Claim amount between 10 000 and 20 000: 1% of claim amount (consumer) 3% of claim amount (non-consumer) JusticeOnline videoconferencing system: total monthly fee of 128(including monthly subscription and air time)			

25

<p>Name of provide</p> <p>The Virtual Magistrate</p>	<p>URL</p> <p>www.vmag.com</p>	<p>Location</p> <p>USA</p>	<p>Year established</p> <p>1996</p>
<p>Names of program(s)</p> <p>VMAG</p>	<p>Service provided</p> <p>Arbitration</p>		

Communication means Web-based platform(Online filing form, response form, etc), email(listserv)	Duration of proceedings Typically 72 hours after acceptance of the complaint
Types of disputes Online disputes, i.e. spamming, defamation or inappropriate messages, contract, property or tort dispute regarding online issues	Languages English, other possible not specifies
Fee structure Free of charge	

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Name of provider WIPO arbitration and mediation centre	URL arbitr.wipo.int/domains	Location Switzerland	Year established 1999
Service provided In addition to arbitration and mediation of IP disputes, non-binding arbitration of domain name disputes under UDRP rules			
Communication means Online filing through web-based filing form or, by email AND hardcopy. All subsequent communications take place via email		Duration of Proceedings Typically two months	
Types of disputes Domain names disputes	Languages Chinese, English, French, German, Italian, Japanese, Korean, Norwegian, Portuguese, Russian, Spanish		
Fee structure(in USD) 1 500 for 1-5 domain names 2 000 for 6-10 domain names Fee to be decided in consultation with the Arbitration and Mediation Center for disputes involving more than 10 domain names			
Volume of cases More than 5 500 cases under the UDRP rules handled since inception through 2003			

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Name of provider Word&Bond	URL www.wordandbond.com	Location UK	Year established 2001
Names of program(s) Interactive Neutral Evaluation System Interactive Arbitration system		Service provided Early neutral evaluation, arbitration	
Communication means Web-based online filing form with possibility of insert attachment, email(if applying for an annual licence), offline tools (e.g. fax etc)		Duration of proceedings Max. 14days for arbitration	

Types of disputes Commercial Disputes (B2B and B@C)	Languages English, other possible languages not specified
Fee structure(in EUR) Annual member ship fees <u>Access to B2c platform:</u> 350 for business with turnover below 100 000 725 for businesses with turnover between 100 000 and 249 999 1 700 for businesses with turnover between 250 000 and 499 999 3 500 for businesses with turnover between 500 000 and 999 999 8 000 for businesses with turnover between 1m and 5m 13 000 for businesses with turnover over 5m <u>Access to the B2B platform</u> 2 500 for businesses with turnover below 2m 4 000 for businesses with turnover between 2m and 4 999 999 725 for businesses with turnover between 5m and 19 999 999 725 for businesses with turnover over 20m Arbitration fees (in addition to membership fees) <u>B2C claims:</u> 160/50 (latter including experts' report) for claims up to 1 000 220/320(latter including expert's report) for claims between 1 000 and 2 499 250/350(latter including expert's report) for claims between 2 500 and 4 999 220/320(latter including expert's report) for claims over 5 000 <u>For B2B claims</u> Fees are set according to the provisions of the standard holder's dedicated scheme	

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European Union

EU Data Privacy Protection Directive 95/46/EC of October 1995

EC Directive 93/13/EEC of April 1993, on Unfair Terms in Consumer Contracts.

EC Convention on the Law Applicable to Contractual Obligations (Rome 1980) available at <http://www.jus.uio.no/lm/ec.applicable.lw.contracts.1980/doc.html>

Germany

Code of Civil Procedure (*Zivilprozessordnung*) (Sec. 1025-1066ZPO)

Digital Signature Act 1997 (Gesetz zur Digitalen Signatur), 13 June 1997

Singapore

Electronic Transactions Act, 1998

South Africa

Arbitration Act, 42 of 1965

Electronic Communications and Transactions Act, 25 of 2002

Sweden

Arbitration Act, 1996

Switzerland

Private International Law Act, 18 December 1987

United Kingdom

Consumer Arbitration Agreements Act, 1988

Electronic Communications Act, 2000

English Arbitration Act

United States of America

Electronic Signatures in Global and National Commerce Act, October 2000(E-Signature Act)

Federal Arbitration Act, 1996

Uniform Computer Information Transaction Act, 1999(UCTA)

Michigan-House Bill 4140 seeking to establish the Michigan Cybercourt (2001)

United States Federal Board's implementing Regulation Z

Conventions and other texts

New York Convention on the Enforcement of Foreign Arbitral Awards (New York) 1958

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www.consumerinternational.org/document_store/Doc29.pdf, December 2000, accessed on 23rd September 2005

D. International arbitration Rules

International Chamber of Commerce (ICC) Arbitration Rules (came into effect on 1st January 1998) may be accessed at
<http://www.iccwbo.org/court/english/arbitration/rules.asp>

UNCITRAL Model Arbitration Rules available at
<http://www.uncitral.org/english/texts/arbitration/arb-rules.htm>

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Vita Food Products Inc v Unus Shipping Co Ltd [1939] AC 227 (27)
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